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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1912.

No. 678.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS AND MAJOR MOSES HARRIS, GENERAL TREASURER THEREOF, APPELLANTS,

vs.

J. E. PARRISH.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JUNE 19, 1913.

(23253)

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a No. 2186. United States Circuit Court of Appeals, Sixth Circuit.

NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers et al., plaintiffs in error,
vs.
J. E. PARRISH, DEFENDANT IN ERROR.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Certified record. Filed — day of June, 1911.
Samuel C. Williams, Johnson City, Tenn., for appellant.
Shields, Cates & Mountcastle, Knoxville, Tenn., and Harr & Burrow, Johnson City, Tenn., for appellee.
Filed June 5, 1911.

FRANK O. LOVELAND, *Clerk.*

1 to 7 In the United States Circuit Court for the Northeastern Division of the Eastern District of Tennessee.

NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers et al.
vs.
J. E. PARRISH.
No. —. In Equity.

Complainants' stipulation as to record.

In the above-entitled cause the complainants as appellants stipulate that on their appeal to the Circuit Court of Appeals the following portions of the record shall be printed:

1. The original bill.
2. The answer thereto.
3. The cross bill.
4. The answer thereto.
5. The amended bill.
6. The answer thereto.
7. One of the two original construction contracts between the complainants, Harris, general treasurer, and defendant, J. E. Parrish, which contracts are filed as exhibits to deposition of J. E. Parrish, No. 1.
8. So much of the written opinion of Judge E. T. Sanford in the Circuit Court as relates to the allowance of interest on the amount recoverable by said Parrish in this cause, and the preliminary statement of case in said opinion before taking up in detail the exceptions to master's report.
9. The decree of Oct. 15, 1910, the decree of Jany., 1911, and all decrees of Judge Sanford in the case.

10. The assignment of errors; petition for appeal; order allowing appeal; bond and direction for appeal from the Department of Justice of U. S. A.; citation and acceptance of service thereon.

11. This stipulation, which shall precede the other parts aforesaid.

This April 17, 1911.

S. C. WILLIAMS,
Sol. for Complts. and Appellants.

Filed April 17, 1911.

H. L. MILLIGAN, *Deputy Clerk.*

8 In the United States Circuit Court for the Northeastern Division of the Eastern District of Tennessee.

NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers et al.
vs.
J. E. PARRISH.
} No. —. In Equity.

Defendant's stipulation as corrected.

In the above-entitled cause the defendant, as appellee, stipulate that on the appeal to the Circuit Court of Appeals the following portions of the record shall be printed:

1. All that portion of the opinions of Judge E. T. Sanford in the Circuit Court as relate to the allowance of interest on the amount recovered by the said Parrish in this case, this stipulation simply to make more specific section 8 of complainants' and appellant's stipulation, so as to embrace the opinion of Judge Sanford on the question of interest whether contained in one or more written opinions of Judge Sanford.

SHIELDS, CATES & MOUNTCASTLE,
For Parrish.

Filed April 25, 1911.

H. L. MILLIGAN, *Deputy Clerk.*

Bill.

In the Circuit Court of the United States, Northeastern Division of the Eastern District of Tennessee, at Greeneville.

NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers et al., complainant,
vs.
J. E. PARRISH, DEFENDANT.
} In Equity.

To the honorable the judges of the Circuit Court of the United States in and for the said district:

The National Home for Disabled Volunteer Soldiers, a body politic incorporated by the act of Congress of the United States of America,

with its situs and headquarters in the State and city of New York, and not a citizen or resident of the State of Tennessee, and Moses Harris, general treasurer thereof, a citizen and resident of the State of New York, and not a citizen or resident of the State of Tennessee, bring this, their bill of complainant, against J. E. Parrish,
9 a citizen of the State of Virginia, a resident, inhabitant, and doing business in the county of Washington, State of Tennessee, and within the Northeastern Division of the Eastern District of Tennessee.

I.

Complainants respectfully state that the National Home for Disabled Volunteer Soldiers is a body corporate under the laws of the United States, being created such by Congress (act March 21, 1866), as a medium through which the National Government could the better provide for the volunteer soldiers disabled in its service and in need of hospital and asylum privileges, the President of the United States, the Secretary of War, the Chief Justice of the United States, and certain others, nominated by Congress, being its board of managers. The corporation is empowered to take and to hold property, sue and be sued, etc., and to construct and manage homes for the care and comfort of disabled soldiers. It is dependent for support upon the National Treasury.

II.

In pursuance of its powers, and an act of the Congress to that end, a branch home, known as the Mountain Branch, has been located and established near the town of Johnson City, Washington County, Tenn., where a reservation of 450 acres has been purchased, upon which has been erected various buildings suitable for the occupation and use by said wards of the National Government. Said buildings are erected through contractors, who engage in writing to construct particular buildings.

III.

The first buildings at the Mountain Branch let to contract by the board of managers was what is known as the hospital group. Defendant J. E. Parrish being the successful bidder therefor. On November 19, 1901, a contract was accordingly entered into by and between Defendant Parrish and Complainant Moses Harris, general treasurer, National Home for Disabled Volunteer Soldiers (the said treasurer contracting in behalf of said complainant corporation), for the construction of, and furnishing of, all materials and labor for the administration building, the kitchen building, and two ward buildings of said hospital group, the corridors, a fountain, etc. A true copy of said contract is filed as Exhibit "A" to and as a part of this bill of complaint (not to be copied in the issuance of process). As will be seen, the said contract was to be completed within one year—by November 18, 1902.

IV.

Complainants further state that on March 8, 1902, the same parties, complainant and defendant, entered into a second contract for the construction, etc., by Defendant Parrish of two additional ward buildings, required by the architect's plans to complete the said hospital group, the time for completion of said ward buildings being fixed at January 7, 1903. The second contract was substantially in the language of the first one. Said defendant has a counterpart of same in his possession.

V.

Both of said contracts contain the provision that "if, in any event, the second party (Defendant Parrish) * * * shall, in the judgment of the architect in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then party of the first part, or his successor legally appointed, shall have the power to annul this contract by giving notice in writing to this effect to the party of the second part; and upon the giving of such notice all money and reserved percentage due or to become due to the party of the second part by reason of this contract shall be and become forfeited to the National Home for Disabled Volunteer Soldiers, and the party of the first shall be thereon authorized if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed by Section 3709 of the Revised Statutes of the United States; provided," etc.

VI.

Complainants show that, notwithstanding Defendant Parrish was guilty of numerous negligences and defaults in respect of his execution of said contracts, warranting their annulment, the board of managers were asked to and did, on October 24, 1902, grant said defendant a further limit of time within which both of said contracts should be completed, to-wit, by May 15, 1903.

VII.

Complainants further state that when the said extension perioa was about to expire it became apparent that the defendant would not complete the buildings aforesaid by the time fixed, and they were averse to granting an extension to defendant, so unsatisfactory had been their experience with him in respect of the manner of executing the work, as well as of the time consumed. Finally, however, by means of assurances not kept, but breached, complainants were induced to grant a second extension of time for the completion of said contracts, to-wit, until August 15, 1903.

VIII.

Complainants further state that Defendant Parrish has failed to complete said hospital group by August 15, 1903, same being, in many respects, incomplete and unfit for the occupation by inmates
11 on that date. Further, in the judgment of the architect in charge, so indicated to the complainants, Defendant Parrish had failed to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the contract—in many respects, the work done was far below the specifications; this in addition with the failure to complete within the time limited.

IX.

Accordingly, promptly upon the expiration of the time limited, August 15, 1903 (Saturday), complainants exercised the power to annul said contracts, so notifying the defendant by telegram of date Saturday, August 15, 1903, duly delivered, and by notice in writing to that effect to said Parrish, duly and personally served on him, on Monday, August 16, 1903. True copies of said written notices are here filed as Exhibits "B," "C," "D," and "E," as parts of this bill of complaint (not to be copied in issuance of process).

Said notices, as will be seen, declare the said contracts annulled, owing to the defendant's failure to comply with the contracts' specifications, and terminated by reason of the failure to complete within the agreed extension period.

The officers and agents of complainants, under orders to that end, at once took charge of the building, placing guards and watchmen therein.

X.

Complainants further state that the defendant Parrish disregards the notices aforesaid and the injunction therein embodied, that defendant cease all work of every description on said buildings and cease to exercise any control or supervision over the same; and, over the protests of complainants, repeated to him from time to time, persists in sending his superintendent and workmen into said hospital group of buildings and in going into same himself and there exercising control over his employes at work in a purported effort to carry forward the work of construction.

Defendant Parrish openly stated to his employes to keep at work in disregard of the notice aforesaid; that if necessary to keep them at work he, defendant, will settle with them every night.

This course is pursued by defendant, notwithstanding the favors shown him in the grant of two extensions, notwithstanding his, defendant's, repeated confession of the fact that he is unable to further finance the construction of said buildings and the repair of same in respects in which construction was defective, and notwithstanding

the expressed wish of the surety on his bond that said defendant cease such efforts.

Complainants, upon advice, state and charge that defendant Parrish is, in pursuing said course, a trespasser in and about said building.

12 XI.

Complainants state that they will be irreparably injured if defendant be permitted to so continue his attempts to occupy said building with workmen and to further construct and repair same, in this:

(a) Time was of the essence of construction contracts aforesaid, and so made in order that the hospital group might be ready for inmates as early as possible. The hospital group is, in its appointments—kitchen, dining room, etc.—capable of being run wholly independent of other buildings (save only powerhouse, now about finished), and capable of accommodating 300 inmates. The home can thus be opened to inmates when the hospital group is completed, and thousands of old soldiers are pressing for admission. If defendant is permitted to delay complainants by his said efforts, the time of completion by complainants will be postponed, which will in turn result in a delay in opening the home to members.

(b) It is essential to the carrying out of the plans of the complainants in respect of future legislation by Congress that the hospital group be open for inmates and occupied before December 1, 1903. Appropriations to be made for the support of the institution as a going concern will depend upon this.

(c) Upon the assurances of the defendant Parrish that he would complete the group for occupancy within the time stipulated, complainants have purchased large lots of hospital equipment and supplies, which should be promptly opened and placed. Some of these cannot be placed until the said buildings are completed and are stored at a considerable cost and hazard, being now packed in inflammable material.

(d) Complainants are embarrassed in closing certain accounts to the end of the fiscal year, June 30, 1903, until said building is completed and equipment placed and attached to the building.

(e) Much, if not all of the work now being done by defendant Parrish since the date of the said annulment, is defective under the specifications and will have to be done over again, thus entailing a double loss of time—in first undoing and then reconstructing the work.

Complainants therefore charge that said acts are contrary to equity and good conscience and tend to the irreparable injury of complainants, who are remediless in the premises at common law and can only have relief in a court of equity.

XII.

Complainants show that the amount involved in this litigation is in excess of two thousand dollars.

XIII.

13 Complainants show that the said hospital group is located upon the aforesaid reservation, jurisdiction over which has been ceded by the General Assembly of the State of Tennessee to the United States of American (Tennessee act, 1901, ch. 98).

XIV.

Complainants state, on information and belief, that defendant Parrish is theatening complainants with litigation over said contracts, claiming that large sums are due and payable to him; all of which is groundless, on the basis of said contracts being completed as therein stipulated.

XV.

Premises considered, the prayer of the complainants is: That to the end that complainants may have that relief which they can only be awarded in court of equity, defendant, J. E. Parrish, be subpœnaed by your honor's writ, directed to him, commanding him at a certain time and under certain penalty therein limited personally to appear before this honorable court, and then and there true answer make (not under oath, which is waived) to all and singular premises, and further to stand to and abide by the orders and decrees of the court; and that the writ of injunction be granted complainants, restraining and enjoining said J. E. Parrish, his agents, attorneys, and employes from further attempting to occupy said hospital group of buildings for the purpose of working thereon or therein, or otherwise, and from interfering with the complainants, their officers, agents, assigns, and contractors in the prosecution of said work; that the court, having assumed jurisdiction for said purpose, retain jurisdiction for the purpose of accounting on the basis of the contract or quantum meruit, if defendant desires to resort to such accounting or same be found necessary or advisable; that all necessary orders and decrees be rendered; that on final hearing the injunction be made perpetual; and that complainants be granted general relief.

This is the first application for extraordinary process.

NATIONAL HOME FOR DISABLED VOL. SOLDIERS,
and
MOSES HARRIS, *General Treasurer*,
By JOHN T. RICHARDS, *Assistant Inspector General*.

KIRKPATRICK, WILLIAMS & BOWMAN, *Solicitors*.

Filed August 22, 1903.

HENRY O. EWING, *Clerk*.

14 *Answer.*

In the Circuit Court of the United States, Northeastern Division of the Eastern District of Tennessee, at Greeneville.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS ET AL. VS. J. E. PARRISH.

Defendant, J. E. Parrish, for answer to the bill filed against him in the above-styled cause, says:

I.

That he is a contractor, and has for several years been engaged in the construction of public buildings and on Government works.

The defendant, N. H. D. V. S., is a corporation under the laws of the United States, and is now and has for the last two years been engaged, through its board of managers, in the construction of a home for soldiers at Johnson City, Tennessee.

In the plans proposed are many costly buildings, to be devoted to its different purposes and uses, and among these is a group of buildings called the hospital group, consisting of six buildings, with connecting corridors and verandas.

On the 19th day of November, 1901, and March 8th, 1902, the contracts for the construction of the hospital group were entered into by defendant, acting in behalf of himself, and by complainant, acting through Moses Harris, its general treasurer.

These contracts were accompanied by plans and specifications for the buildings, in which the labor and material required is given in detail.

The contracts fixed the price to be paid complainant for the performance of the work on his part and the terms and conditions under which it was to be done.

The contract prices as agreed upon are as follows:

Amount of first contract	$183,497.00
Amount of second contract	91,694.00
Extra labor and material up to date	20,940.67
Total	$296,131.67

It was expressly provided "that payments were to be made to J. E. Parrish monthly, when the work herein contracted for shall have been delivered and accepted, reserving 10 per cent from each payment until the whole work shall have been delivered and accepted."

These contracts and specifications are made Exhibits "A" to this answer, and asked to be read and treated as part of it.

15 They provided for the commencement of the work December 1st, 1901, and for its completion on or before November 18th, 1902, but the time was extended to May 15th, 1903, and later on to

August 15th, 1903. These contracts for extensions are made Exhibits "B" hereto and a part hereof.

Under the title "Additional clauses" the contract of November 19th, 1902, provided, "That in order to facilitate the work the architect will, from time to time, make approximate estimates in writing of the value of the work completed since the last progress payments, provided the amount of such approximate estimates be or exceed $50,000, and the home will cause to be paid to the contractor 90 per cent of the amount of such estimates, provided that the parties of the first part may at all times reserve and retain out of such amounts as by the terms of this contract they have been authorized to retain."

It was further provided that if defendant should fail to complete the work in the time specified he should pay as a forfeit $25.00 each day thereafter until he should do so. This provision was found under the title "Additional clauses."

The defendant executed to the home good and solvent bonds in the sum of $90,000 for the performance of the contract. A copy of these bonds is made Exhibit "C" hereto, and is asked to be read and considered a part of this bill.

It will be seen from the contracts of November 19th, 1901, and March 8th, 1902, that to the "architect was to be submitted all questions concerning plans, specifications, sizes, materials, and workmanship."

He was to have reasonable and proper facilities for the inspection of all work done and material furnished under this contract.

It is further provided that if, in the judgment of the architect, complainant should "fail to prosecute faithfully and diligently the work in accordance with specifications of this contract," then in either event the party of the first part, or his successor, legally appointed, shall have the power to annul this contract by giving notice in writing to that effect, and upon giving such notice all money as reserved percentage, due or to become due to the party or parties of the second part by reason of this contract, shall be and become forfeited to the National Home for Disabled Volunteer Soldiers, and the party of the first part shall thereupon be authorized, if an immediate performance of the work and delivery of materials be in his opinion required by the public exigency, to proceed to provide same by open contract or purchase.

II.

16 Defendant commenced the work on the buildings in the time agreed upon and has continued to prosecute the same towards completion to the present time with all possible diligence on his part.

The entire work of construction, as agreed upon in the contract, has been fully nine-tenths completed, and it will now only require from sixty to ninety days in which to complete the whole of it.

The labor and materials furnished under this contract to this date, upon fair and just estimates, would be worth $277,820.02.

The statement of the labor and materials furnished to this date is made Exhibit "I" hereto.

It is here shown that work on extras has in the meantime been done amounting to about $20,940.67.

An itemized statement of this extra work is made Exhibit "2" hereto.

There has been paid to complainant, from time to time, sums amounting to $210,172.06.

An itemized statement is made 1–5 hereto.

There is due to complainant for labor and material actually furnished for the home to August 21st, 1903, the sum of $67,647.96, as shown by Exhibit No. 1 hereto.

III.

The charge in the sixth section of complainant's bill "that notwithstanding defendant Parrish was guilty of numerous negligence and defaults in respect of his execution of said contracts, warranting their annulment, the board of managers were asked to, and did, on October 24, 1902, grant said defendant a further limit of time within which both of said contracts should be completed, to wit:

May 15, 1903, "even if true, offers no ground of relief for complainants. It shows a complete waiver of any relief that could be predicated on defendants' numerous negligences and defaults in respect of his execution of said contracts" up to that time.

But as a matter of fact, these vague, indefinite, and mythical charges are, as indicated in the manner in which they are made, unstable and untrue.

They are in strange contrast with the language of the supplemental contracts of October 24, 1902, extending the time to complete the contracts to May 15, 1903, which show that "on account of unusual conditions of weather, and for other reasons, the party of the second part has made request in writing that the time, as stipulated in the contract for the completion of the work, be extended, and it appearing to the party of the first part that such request is reasonable and just, now, therefore, it is mutually agreed that the time for the completion of the work named in the contract . . . is hereby extended," etc.

17 It thus clearly appears that up to October 24, 1902, there had been nothing done by defendant that would, in the judgment of complainants or the architect, justify an annulment of the contracts.

If there had been "negligence" in the construction of the work, the architect could have condemned it and had it done properly. If there had been "defaults" in not completing the work in time, it was "on account of the unusual conditions of the weather," or for other reasons that, in the judgment of the board of managers, were "reasonable and just."

On May 6, 1903, supplemental agreements No. 2 were entered into, extending the time for the completion of the work under both contracts to August 15, 1903, "by which date it is agreed that said buildings shall be fully completed in accordance with the terms of the contract," etc. . . . . "In consideration of this extension of time for the completion of the work, as above set forth, the said J. E. Parrish agrees that Jno. G. Unkefer shall continue in charge and management of the work specified in said contracts and supplemental agreement under the terms of an agreement now existing between the said J. E. Parrish and the said Jno. G. Unkefer, until such work shall have been fully completed."

It will be seen that the consideration for this extension was that one Jno. G. Unkefer should have active management and control until the buildings should be fully completed. Complainants seemed to prefer that the work should be carried on and completed under the active direction and management of Mr. Unkefer as his attorney in fact rather than that of defendant.

To this defendant unwillingly consented. At the instance of complainants, he allowed this course to be taken. Unkefer was to continue in charge and management of the work.

Mr. Unkefer failed to complete the work by August 15, 1903. August 5, 1903, he resigned his position as defendant's attorney, agent, or manager and gave up the work. Defendant again took charge of the work and was doing all in his power to hurry it to completion. He was making fine progress when, on August 15, 1903, he was notified that his contracts had been annulled and all amounts due him had been forfeited.

Defendant charges that as complainants selected Unkefer to manage and control the work which defendant had contracted to do, and required defendant to accede to Unkefer's management, they cannot now be heard to complain that Unkefer did not complete it within the time provided for in the contract.

Defendant denies that under the terms of the contracts with
18 him the right to annul and terminate said contract and claim his unpaid earnings thereunder as a forfeit was given or exist for any failure on his part to complete the work within the specified time, and so far as the action of complainants is based upon this ground it is wholly without warrant or authority.

It is denied that the work done or any part of it was below the specifications. It is denied that defendant has failed to prosecute faithfully and diligently the work, or any part of it, in accordance with the specifications and requirements of the contract. It is denied that the architect has indicated or rendered such judgment to complainant.

Defendant avers that there is no cause or reason on which such judgment can rest. If such judgment has been indicated or pronounced it is unjust, unfair, and fraudulent.

As elsewhere stated, owing to the absence of said architect from the work, he did not have that personal knowledge of the facts which

enable to give judgment, and upon the real facts in regard to said matter a judgment as indicated would be unjust and fraudulent.

It is imputable alone, bad faith or gross neglect. Moses Harris, general treasurer, N. H. D. V. S., as appears from the notice given to defendant, himself annulled said contracts without the action of the Board of Managers of N. H. D. V. S., which he had no right to do. The party of the first part is N. H. D. V. S. and not Moses Harris.

The contract is executed by Moses Harris, as the home's officer, "for and in behalf" of the home. But whether said contract is approved or not by the board of managers, or whether the power of Moses Harris, general treasurer, to annul said contract exists, in either event the action taken was upon alleged judgment of the architect and is wrongful, because said architect's judgment is wrongful and unwarranted.

Defendant further denies that said clause in the contract is valid or enforceable in a court of law and equity.

It is inconsistent with and destroys the mutuality of the contract itself. It may be proper for the parties to contract to submit differences as to material and labor to an arbitrator, but a provision which allows either to annul the contract upon his judgment is void for want of mutuality, and should be condemned as unconscionable and oppressive, and certainly should not be enforced in a court of equity.

IV.

On the 15th day of August, 1903, your defendant received notice from Moses Harris, general treasurer, N. H. D. V. S., that his contract with the home for the construction of the hospital group of buildings was "terminated and annulled," and on the 18th day of August, 1903, he was also notified by the same party, by telegram,
19 that "by annulment of contract all unpaid balances on contracts are forfeited to the home."

The retained percentage alone, due defendant, amounted to $27,782.00, to say nothing of the sums due to him for the labor and materials furnished by him on the work not estimated.

The total amount of the forfeiture thus claimed is about $67,647.96.

Since the receipt of these notices, defendant's superintendent of instruction and assistant inspector general has protested against the defendant doing any further work on the premises, and has even gone upon the ground and announced to the laborers and workmen that the home had "terminated and annulled" the contract with defendant, and that they need not look to it for pay, and this protest was followed by the bill and restraining order in this cause.

The letters and telegrams from Moses Harris, general treasurer, will be filed as evidence before the hearing.

This action of the home, stated in said notices to be taken upon the ground that defendant had failed to meet the "specifications and requirements" of his contract without, stating in what respect or particulars said contract had been breached, and also in stating that the

time for performance had expired when the time limit had been waived by the provision for a daily forfeit of $25.00 and by the contracts for extensions, and as will be shown hereafter, and by the acts and conduct of complainant, which made it impossible to perform the same in said limits, is without excuse or justification, and will not for a moment be upheld or tolerated in a court of equity.

The bill itself follows said letters and telegrams, and merely states in general terms a failure on the part of defendant to do the work within the time.

Complainant's bill appears to be an effort to conceal, from defendant, the grounds upon which complainants acted in attempting to annul his contracts. It is an effort to draw defendant out, and after he has disclosed his defence, still other "negligences and defaults" will be conjured up in the attempt to justify complainant in its first breach of the contracts.

Defendant has asked of complainant's counsel a detailed statement of the grounds on which complainant has attempted to annul its contracts with defendant and declare forfeited the amount due him for materials and labor furnished under said contracts, and has expressed a willingness, through his counsel, to furnish complainant a copy of this answer when completed, and when he is furnished with the details above mentioned.

Defendant here and now calls for the report of the architect upon which complainant assumed to annul the contract and to declare the forfeiture.

In trying to justify an unwarranted attempt to take from defendant sixty-odd thousand dollars due him by claiming it as a forfeiture, the original bill in this case garbles the contracts and quotes a forfeiture clause in the printed form of contracts, gotten up years ago, when J. M. Bermingham was general treasurer. This forfeiture clause was itself abrogated and annulled by one of the "Additional clauses," printed on a separate sheet of paper, and evidently at a later date, which provides: "That if the contractor shall fail to fully and entirely complete the work, as provided for in this agreement, in each and every part within the time hereinbefore limited for such performance and completion, the said contractor shall and will pay to the said parties of the first part, in consideration of the damages sustained by said parties of the first part on account of the non-completion of the building, and the consequent loss of its use, the sum of $25.00 per day for each and every day after the expiration of the time limit of this contract, during which the contract shall be incomplete and finished. And the said parties of the first part shall and may deduct the said sum of $25.00 per day from the moneys that may be due or become due to the said 'contractor' under this agreement."

This section of the contract, which provided ample protection against any failure to prosecute faithfully and diligently the work thereunder, is ignored, and a clause with provisions that are inequitable, unconscionable and unjust, is invoked to take its place.

This would be forfeiture, if based upon the judgment of an architect, who has not been on the home reservation for weeks, if not months, and, therefore, incapable of forming any judgment of his own, is arbitrary, usurpatory, and corrupt. It is not the act of the board of managers of the National Home for Disabled Volunteer Soldiers. They have been in the far West since the latter part of the month of July, and have had little, if any, knowledge of the condition of affairs at the home.

Defendant shows unto your honor that heretofore and prior to August 15th, 1903, four supplemental agreements for changes, extensions of time and additional work had been entered into with defendant, and several other proposed changes and matters requiring additional work and materials and time were at the time, and had been for several days, under consideration and advisement, and your complainant was ordered not to proceed with certain portions of the work until these agreements making the changes were decided upon.

These proposed changes, if agreed upon, would affect the
21 other work and plans to some extent, so that the actual finishing of the work would have to be done with reference to these matters. No definite action as to these proposed changes has yet been taken by the home officials, and defendant received no instructions as to this work since about August 1st, 1903, when he was ordered not to proceed further until the question of changes was settled. The delay incident was not the fault of defendant.

As shown hereinbefore, a large number of extras have, during the progress of the work, been imposed upon your defendant, which required much labor and time to perform, which was unforeseen and unprovided for at the time the contract was entered into, and complainant has frequently, during the progress of the work, been at fault in not giving defendant the monthly estimates, as provided for in the contract, giving at other times estimates which were grossly inadequate, unfair, and unjust.

The proper, just, and prompt observance of this obligation of the contract on the part of defendant was necessary and indispensable to the execution of the work by defendant within the time now so unjustly contended for by complainant.

Defendant denies that time was or is of the essence of the contract. Even if time was of the essence of the contract, the failure to complete it in time was the fault of complainant. The architect's order, stopping the order for slate, and his refusal later on to give direction as to necessary slate for roofs, caused at least 10 months' delay.

V.

Your defendant shows that the architect who at the time the contract to construct the hospital group was entered into was in charge of the plans and specifications, who drafted and prepared the same, and who had been and is now in charge of said work is J. H. Freedlander. He lives in the city of New York. He has only been in

Johnson City, and upon the premises, two or three times in the last six months. On the first of these occasions he only remained about two days. On the last occasion, which was about five weeks ago, he only remained on the home reservation one or two days.

It was the understanding at the time the contract was entered into by the parties that the architect would be a person competent in every way, fair minded, impartial, and free from prejudice. He was not of defendant's selection. He was of the choice of complainant. He was given large powers and entrusted with the responsible duties of the position. The law itself guaranteed to defendant fairness, impartiality, and absolute protection from fraud and wrongdoing, and upon this defendant is now forced to place his reliance.

22 Defendant shows that said architect has, by his course of proceedings, from time to time worked great wrong and injury upon him, causing him great losses of time and money, and working delays which has made it impossible to complete the work in the limit.

Defendant shows that said architect is incompetent. Some of the board of managers have admitted their mistake in selecting him. This is shown by the plans prepared by him for said works. They could not be worked out into the buildings without material and important changes. The changes made necessary by his crude and ill-considered plans necessitated heavy additional expense, long delays which the architect arbitrarily and unjustly imposed upon defendant. He was not impartial and fair minded, but in the settlement of each and every question between the home and defendant was unfair to defendant and prejudiced in favor of the home. He expressed himself to others that he did not care what it cost defendant to complete the work, and was unmindful of defendant's rights and interests. He often failed to act in the performance of his duties when delay was injurious, if not ruinous, to defendant, and would not assist and act as he could have done and was his duty to do in the prosecution of the work.

When differences would arise between complainant and defendant, reports would be sent to the architect in New York, and the long and unnecessary delays in hearing from him onerated defendant with heavy additional expenses. He appointed one Hutton to act for him. The said Hutton did act for him for several months, when he was discharged from the work. A large amount of work done under the orders and according to the directions of said Hutton was ordered torn out by said Freedlander, and the cost of replacing same, amounting to about $10,000, was unjustly imposed upon defendant. In this matter defendant was without fault, yet he was made the sufferer.

Defendant shows that said architect, when chosen and put in charge of said work, was required to perform the duties of that office himself. When the time and occasion came for him to pass upon any questions affecting the rights of the parties, his personal judgment and decision could alone be decisive and binding upon the parties.

Instead of acting in this manner, he has attempted to delegate these important duties to others; and he was and is without that personal knowledge of the work and materials employed and used by defendant which it is necessary for him to have in order to act intelligently and within the scope of his powers upon the important questions involved. In this manner arises the assertion of
23 complainant's officers that defendant has not complied with the conditions and requirements of his contract, and upon this unfair and unwarranted contention defendant has wrongfully attempted to terminate and annul the contract, but in so doing it has itself, as defendant charges, breached said contract.

The action taken by complainant was not the action of the N. H. D. V. S., through its legally constituted board of managers, through whom alone it can act. At the time its board of managers were not in New York but were in the State of California, and defendant denies they did or could act officially in this matter.

For several months prior to this breach of the contract, on August 15, 1903, this far-away architect has withheld estimates which should have been promptly made and paid and frequently allowed only partial amounts due to defendant when he did make them. He frequently ordered work already done torn down and rebuilt at the expense of defendant in order to remedy defects in his plans and forced the same to be done over the protest and to the great loss of both time and money to defendant.

He would frequently change the plans, finding it impossible to execute the work. In the canvas roofing of the verandas and corridors alone he made and forced upon defendant alterations which has made it cost defendant more than double the cost of the original design for the same work. This occasioned to defendant the loss of both time and money. It was unreasonable and not contemplated in the original contract. This is only one of many similar instances which will be shown fully in proof.

Defendant shows that up to the time the restraining order was issued in this case he was on the premises doing all that could be done to carry out the contract and complete his work. He had a large force of hands in his employ and at work on every available part of the unfinished buildings. He had on the grounds, in transit to the grounds, and already purchased to be at once shipped almost all the material necessary to complete the work. This material alone cost him thousands of dollars. If not used on the work it will be useless to complainant, or, at least, will be upon his hands at a loss of thousands of dollars. Almost every part of the work is incomplete but well-nigh completed. It will require an expenditure of only about $20,000 to finish the work. The walls are all up and pointed, the roofs are completed, the plastering is about done, the windows are in, the finishing floors are being laid, the doors are being hung, the inside trim is being put in place, and all that remains is some inside finishing and a little cleaning down on the outside and a few small items of outside work, which defendant is pushing to an early completion.

24 The work, which the board of managers contemplated would take about two years for completion, is now within sixty to ninety days of completion.

In this advanced condition of the work the attempt is made to "terminate and annul" the contract and leave defendant alone to bear the loss and irreparable injury. The forfeit as claimed by complainant is over $67,000, or more than three times the amount necessary to complete the work. This unjust, unwarranted, and fraudulent decision and claim is most unconscionable and condemned by every sentiment and principle of fairness and equity.

The clause providing for an annulment of the contract when, in the judgment of the architect, the contractor shall fail to prosecute faithfully and diligently the work, in which event all money or reserved percentage due or to become due the contractor shall become forfeited to the N. H. D. V. S., is in conflict with the section in the "Additional clauses" to the contract, which provided for the payment by the contractor of $25.00 per day, in consideration of the damages sustained on account of the noncompletion of the building and the consequent loss of its use, for each and every day after the expiration of the time limit of this contract during which the contract shall be incomplete and unfinished, and that the party of the first part (N. H. D. V. S.) shall and may deduct the said sum of $25.00 per day from the moneys that may be due or become due to the contractor under this agreement.

The clause in regard to annulment and forfeiture is general and indefinite.

The provision for the payment of $25.00 per day as liquidated damage is particular, definite, and certain, and the former must give way to the latter.

Defendant avers that prior to the expiration of the time given for the completion of the work in the contract of May 6th, 1903, he had requested and made application for an extension of time for 60 to 90 days and was informed that the same would have consideration and answer, but no answer was ever given him as to the conclusion reached. His first advice as to the course to be pursued was contained in the notice given to him by telegram, dated New York, August 15th, 1903, as follows: "Your two contracts for construction have this day terminated and annulled. Notice in writing sent by registered mail. Harris, Gen. Treas."

Defendant avers that he was entitled to judgment from the proper authority, granting or refusing his request or application for an extension of time, and that without such judgment complainant's attempt to terminate and annul the contract is itself a breach of the contract and a denial of his rights thereunder. If it is true
25 that such judgment of refusal was made by one having authority to act in such matters, defendant avers that under the facts herein stated it could not be otherwise than in bad faith and is a wrongful and fraudulent disregard of his rights under the contract.

Defendant avers that whether there was no judgment refusing the extension asked, or a judgment refusing the same wrongfully, as last above averred, it now appearing to the court that the repeated delays and hindrances occurring during the progress of the work from time to time, and since the last extension of May 6th, 1903, were occasioned by the acts of complainant and are not the fault of defendant, and that but for these the work would have been completed in the stipulated time as extended, that the court should decree to defendant, who is present and offering to finish his contract, a reasonable time to do so.

Complainants cannot, by their own judgment, or the judgment of their own officer, determine that an extension of time shall not be granted, and thereby defeat defendant's right to complete the contract, when by their own acts they have made it impossible for him to do so within the stipulated time. Defendant denies that the power or right is given to complainants, by the terms of said contract, to determine whether he shall or shall not have further time, when the failure to complete the work in the agreed time is imputable to the conduct and acts of complainants, and any determination of this question is not binding upon defendant.

Defendant shows that only a few days ago (about August 1st, 1903) the superintendent of construction expressed his satisfaction with the work, or at least his willingness to allow any other person, as attorney in fact or agent for defendant, to go forward in the execution of the work to completion, if plainant would agree for him to do so. There was then no complaint that the work for the month of July, 1903, was not satisfactory and would not be estimated and paid for. The work in the month of August, up to the present time, has been prosecuted by the same workmen and the same grade of materials used and is in every respect and particular up to the work theretofore done on the buildings and which has been accepted and approved.

Defendant shows that he is able to proceed with the work to completion of the buildings if the just, fair, and proper estimates are made and paid to him upon his work. He has paid into the work, in addition to the sum he has received from the estimates, about $28,000 from his own resources. He has due him on retained percentages the sum of $27,782.00. These amounts, together with fair and reasonable profit, can be saved him if he is allowed to do the work himself, but will in all probability be lost to him and sac-
26 rificed if his rights are recklessly disregarded and trampled upon in the manner attempted. There is due him for his July work alone an amount in excess of the sum of $19,000 upon a fair and just estimate, and an additional amount of $19,504.25 for shortage in estimates previous to July, and complainant, in refusing to pay the same, is without excuse or justification, and the attempt to withhold the same can serve no purpose but to oppress and ruin defendant.

Defendant has contracts with other persons to do several features of the work, and the persons with whom he has so contracted have,

in several instances, almost completed the work. They were upon the premises engaged in performing their contracts, and defendants' contracts with them are irrevocable.

Thousands of dollars are involved in these contracts, and if the actions of complainant in attempting to "terminate and annul" the contract is sustained, irreparable loss and injury will fall upon defendant and those with whom he has contracted. Defendant is a young man, 38 years of age, and his name and character as a contractor is involved.

And now come defendant and for cross bill says that the facts stated in the foregoing answer are the facts in this case, and he charges and alleges that he has no adequate remedy at law against the wrongful acts of cross defendant, that the timely interposition of this honorable court, through its extraordinary process, can alone save defendant from ruin and irreparable injury.

That the work is left, as stated before, in well-nigh completed condition, and its exact situation and status is necessary to be known and preserved by competent proof in order that his rights may be declared and enforced, that complainant has breached the contract in many respects, as indicated; that although the work on the hospital group was prosecuted, as stated, to the very amount of the attempted annulment of the contract, and for several days thereafter, until he was stopped by the restraining order in this cause, still no estimate was made to him upon it, while at the same time estimates upon all the other contracts on the home ground had been made several days before and given to the contractors, that this conduct in failing and refusing to estimate his work is unwarranted and without excuse, that the attempt to annul the contract and enforce the forfeiture is inequitable and unconscionable, and should be condemned.

Prayer.

The premises considered, complainant prays process for defendant to the earliest return day of this court, and that they be required to answer this cross bill fully and truthfully, but not under oath,
27 which is expressly waived; that an injunction issue against defendants, enjoining and inhibiting them from terminating or annuling said contracts with cross complainant, or from interfering with cross complainant in the prosecution of his work on the hospital group of buildings under said contracts. That defendants be required to specifically perform their contract with him.

That a mandatory injunction issue, requiring defendants to pay cross complainant the monthly estimates now due, or, in any event, as much as the sum of $19,000, which will be sufficient to complete said hospital group of buildings; that if deemed necessary your honor, by proper order, require that said sum be spent in the completion of said group of buildings under said contracts, leaving the balance due and to become due cross complainant for further ad-

judication; that fair and honest estimates be made and allowed to him on said work.

That on the final hearing cross complainant have a decree for the amount due him on said contracts, including his retained percentage, and extra work which he was compelled to do, such as tearing out work and rebuilding same, where he was without fault, and for damages for this unlawful interference with cross complainant; that all matters be determined and settled by final decree.

If complainant has mistaken his remedy, he prays for all such other, further, and different relief as he may be entitled to in equity and good conscience. And he prays for general relief.

This is the first application for an extraordinary process in this case.

(Signed) J. E. PARRISH

(Signed) ISAAC HARR,
ROBT. BURROW,
Sols.

STATE OF TENNESSEE, *Washington County:*

J. E. Parrish personally appeared before me, the undersigned officer of the law, and made oath, in due form of law, that the facts stated in the foregoing bill as of his own knowledge are true, and those stated on information and belief he believes to be true.

(Signed) J. E. PARRISH.

Sworn to and subscribed before me this August 31st, 1903.

(Signed) HENRY O. EWING, *Clerk.*

Filed August 31st, 1903.

(Signed) HENRY O. EWING, *Clerk.*

28 *Cross bill.*

In the Circuit Court of the United States, Northeastern Division of the Eastern District of Tennessee, at Greeneville.

J. E. PARRISH, COMPLAINANT,
vs.
NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers and Moses Harris, general treasurer of same, defendants.

Crossbill in National Home for Disabled Volunteers et al. vs. J. E. Parrish.

To the honorable the judges of the Circuit Court of the United States in and for said district:

J. E. Parrish is a citizen of the State of Virginia, temporarily resident and doing business at Johnson City, Tennessee, in the Northeastern Division of the Eastern District of Tennessee. The National

Home for Disabled Volunteer Soldiers is a body politic, incorporated under the laws of the United States, with its principal office in New York City, State of New York, but engaged in the construction of a National Home for Disabled Volunteer Soldiers upon its reservation of several hundred acres of land at Johnson City, Tennessee. Moses Harris, general treasurer, is a nonresident of Tennessee and resident of the State of New York.

Complainant, J. E. Parrish, shows to your honors that on or about August 22, 1903, the National Home for Disabled Volunteer Soldiers, a body politic and corporate under the laws of the United States, and Moses Harris, its general treasurer, filed their joint bill of complaint against this complainant in this court.

Said bill sets forth the organization of a branch home, known as the Mountain Branch, and located near Johnson City, in Washington County, Tennessee.

That the first buildings of the Mountain Branch let to contract were what is known as the hospital group, for which complainant, Parrish, was the successful bidder; that in pursuance of said bid a contract was entered into by which complainant was to furnish the labor and materials and construct the administration building, the kitchen, and two ward buildings, the corridors, a fountain, etc., to be completed within one year, by November 18, 1902.

29 That by another contract of the same character complainant was to construct two additional ward buildings and have them completed by January 7, 1903.

That both of said contracts had a clause providing that "if, in any event, the second party shall, in the judgment of the architect in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the contract, then the party of the first part, or his successors, legally appointed, shall have power to annul this contract by giving notice in writing to that effect to the party of the second part; and, upon giving such notice, all money and reserved percentage due or to become due to the party of the second part by reason of this contract shall be forfeited to the National Home for Disabled Volunteer Soldiers."

That on October 24, 1902, an extension of time was granted until May 15, 1903, in which to complete said contracts, and later this time was extended to August 15, 1903.

That complainant failed to complete said hospital group by August 15, 1903, and that in the judgment of the architect in charge, so indicated to the board of managers, complainant had failed to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the contracts; that in addition to the failure to complete within the time limited the work, in many respects, was far below the specifications.

That promptly, on the expiration of the time limit, August 15, 1903, the home authorities exercised the power to annul said contracts and so notified complainant by telegram of date of August 15, 1903, and by notice in writing the following Monday. That said notices declare

said contracts annulled, owing to complainant's failure to comply with the contracts' specifications, and terminated by reason of the failure to complete within the agreed extension period.

The officers and agents of the home, under orders to that end, at once took charge of the buildings, placing guards and watchmen therein.

That complainant Parrish disregarded the notices aforesaid and persisted in sending his workmen into said hospital group of buildings to carry forward the work of construction, and that in so doing he was a trespasser in and about said buildings.

That the home would be irreparably injured if complainant was permitted to continue his attempts to occupy said buildings with workmen and to further construct and repair same, in this:

(a) Time was of the essence of the construction contracts aforesaid, and so made in order that the hospital group might be ready for inmates as early as possible.

30 (b) It is essential to the carrying out of the plans of the home in respect to future legislation by Congress that the hospital group be open for inmates and occupied before December 1, 1903. Appropriations to be made for the support of the institution as a growing concern will depend upon this.

(c) Upon the assurance of complainant Parrish that he would complete the group for occupancy within the time stipulated, the home purchased large lots of hospital equipment and supplies, which should be promptly opened and placed, and that some of them could not be placed until the buildings were completed, and were stored at a considerable cost and hazard, being now packed in inflammable material.

(d) The home officials were embarrassed in closing certain accounts to the end of the fiscal year, June 30, 1903, until said buildings were completed and equipment placed and attached to the buildings.

(e) Much if not all the work being done by complainant since the date of said annulment is defective under the specifications, and will have to be done over again, thus entailing a double loss of time in first undoing and then reconstructing the work.

The said acts were contrary to equity and good conscience and tend to the irreparable injury of the home, which was remediless at common law and can only have relief in a court of equity.

The prayer of the bill was for an injunction to restrain and enjoin complainant Parrish, his agents, attorneys, and employes, from further attempting to occupy said hospital group of buildings for the purpose of working there or therein, or otherwise, and from interfering with the home, its officers, agents, assigns, and contractors, in the prosecution work; that the court having assumed jurisdiction for said purpose of accounting on basis of contract or quantum meruit, if complainant should desire to resort to such accounting or the same to be found to be necessary or advisable.

Complainant filed his answer to said original bill on August 31, 1903, but said answer need not be further noted herein.

And now, as affirmative grounds of relief, complainant shows the following:

I.

On the 19th day of November, 1901, and March 8, 1902, the contracts for the construction of the "hospital group" of buildings were entered into by complainant, acting for himself, and by the National Home for Disabled Volunteer Soldiers, acting through Moses Harris, its general treasurer.

These contracts were accompanied by plans and specifications
31 for the buildings, in which the labor to be performed and the kind and character of the materials required to be used, are given in detail.

The contracts fixed the price to be paid complainant for the faithful performance of the work on his part, and the terms and conditions on which payments were to be made, as follows:

Price to be paid under first contract	$183,497.00
Price to be paid under second contract	91,694.00
Extra labor and materials to August 22, 1903	20,940.67
Extra labor and materials furnished under Sweet's subcontract, not included in the above items	1,054.24
Total	$297,185.91

The items making up this last item are shown in detail in Exhibit No. 7 to this cross bill, but it need not be copied in issuing process.

The contracts expressly provided that "Payments shall be made to the said J. E. Parrish monthly, when the work herein contracted for shall have been delivered and accepted, reserving 10 per cent from each payment until the whole work shall have been delivered and accepted."

The contracts aforesaid are made Exhibit "A" to complainant's answer to the original bill in this case, and are now relied on and made a part of this cross bill as Exhibit "A" hereto, but need not be copied in issuing process.

The first contract provides that the work should commence by December 1, 1901, and be completed on or before November 18, 1902.

The second contract was made March 8, 1902, work thereunder to be commenced by March 10, 1902, and completed by January 7, 1903. The time was extended to May 15, 1903, and later on to August 15, 1903. The contracts for extension are made Exhibit "B" to complainant's answer to the original bill in this case, and are hereby made a part of this cross bill as Exhibit "B" hereto, but need not be copied in issuing process.

Under the title "Additional clauses," both contracts provided that "In order to facilitate the work, the architect will, from time to time, make approximate estimates in writing of the value of the work completed since the last progress payments, provided the amount of such approximate estimates be or exceed $5,000.00; and the home will cause to be paid to the contractor 90 per cent of the amount of such estimates, provided that the parties of the first part

(the home) may, at all times, reserve and retain out of said sum or sums such amounts as, by the terms of this contract, they are authorized to retain."

It was further provided that, if complainant should fail
32 to complete the work in the time specified he should pay as a forfeit $25.00 each day thereafter until he should do so.

This provision will be found under the title "Additional clauses."

Complainant executed to the home, good and solvent bonds in the sum of $90,000.00 for the performance of the contracts, and copies of same are made Exhibit "C" to complainant's answer, and are here referred to as a part of this cross bill, and are made Exhibit "C" hereto, but need not be copied in issuing process.

It will be seen from the contracts that to the architect was to be submitted all questions concerning plans, specifications, sizes, materials, and workmanship. He was to have reasonable and proper facilities for the inspection of all work done and materials furnished under the contract.

It is also provided that, if in the judgment of the architect, complainant should fail to execute faithfully and diligently the work, in accordance with the specifications and requirements of this contract, the home shall have the power to annul the contract by giving notice in writing to that effect, and upon giving said notice, all money and reserved percentage due or to become due to the contractor shall become forfeited to the home, and the home shall thereupon be authorized, if an immediate performance of the work and delivery of materials be, in his opinion, required by the public exigency, to proceed to provide for same by open purchase or contract: "Provided, however, That if the party or parties of the second part shall by freshet, ice, or other force, or violence of the elements, and by no fault of his own or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable," etc.

II.

Complainant was ready and waiting to commence the work on the buildings at the time agreed upon, but was prevented from doing so by the architect, who was not ready for the work to be commenced, and did not get ready until December 16, 1901, at which time complainant did commence work in good faith, and continued to prosecute the same toward completion with all possible diligence and under very adverse circumstances, until he was stopped by the restraining order in this case.

The entire work of construction, as agreed upon in the contracts,
was more than nine-tenths completed, when complainant was
33 stopped by the restraining order, and could have been com-

pleted within sixty to ninety days, at an additional cost of not exceeding $20,000.00, had complainant been permitted to go on with the work.

An itemized statement of the extra labor and materials furnished by complainant is made Exhibit "1–2" to his answer to the original bill in this case.

A statement of the labor and materials furnished by complainant up to August 22, 1903, is made Exhibit "1–3" to his said answer.

A statement of the cost of additional labor and materials that would have been required for complainant to complete the work under his contracts is made Exhibit "1–4" to his said answer.

Complainant has been paid on said contracts sums aggregating $210,172.06, and an itemized statement of the payments is filed as Exhibit "1–5" to said answer.

There is yet due complainant for work already done up to the time he was stopped by restraining order, not included in the estimates made and allowed by the architect, the sum of $38,504.25, as shown by Exhibit "1–6" to his answer aforesaid. This does not include retained percentage.

A recapitulation of the matters of account between complainant and the home is shown in Exhibit No. "1" to complainant's answer in this case.

These several exhibits are hereby made a part of this cross bill and made exhibits thereto by their respective numbers, but need not be copied in issuing process.

III.

On October 24, 1902, complainant was granted an extension of time until May 15, 1903, in which to carry out said contracts. A written agreement made at the time shows that "on account of unusual conditions of weather, and for other reasons, the party of the second part has made request, in writing, that the time as stipulated in the contract for the completion of the work be extended, and it appearing to the party of the first part that such request is reasonable and just, now, therefore, it is mutually agreed that the time for the completion of the work named in said contracts is hereby extended," etc.

It thus appears very clearly that up to October 24, 1902, there had been nothing done by complainant that would, in the judgment of the home authorities or the architect, justify an annulment of the contracts.

On May 6th, 1903, agreements were entered into extending the time for the completion of the work under both contracts to August 15, 1903, "by which date it is agreed that said buildings shall be fully completed, in accordance with the terms of the contracts."

34 "In consideration of this extension of time for the completion of the work, as above set forth, the said J. E. Parrish agrees that Jno. G. Unkefer shall continue in charge and management of the work specified in said contracts and supplemental agree-

ments, under the terms of an agreement now existing between the said J. E. Parrish and the said Jno. G. Unkefer, until such work shall have been completed."

It will be seen that the consideration for this extension was that Mr. Unkefer should have active management and control of the work until the buildings should be fully completed.

To this, complainant unwillingly assented. At the instance of the home authorities, complainant allowed this course to be taken. Unkefer was placed in charge of the work and given power and authority to complete it.

The home having selected Mr. Unkefer to complete the work, and having required that complainant should make him his agent and attorney in fact to that end, and Unkefer having failed to finish the work under the contract by August 15, 1903, the limit fixed by the agreement of the parties after he was put in charge of the work, the home is estopped by every principle of fair dealing to annul the contract because of the failure on the part of the agent of its own selection to complete the work within the time limit.

In his first application for an extension of time in which to complete the contract, complainant did not ask for an extension to cover all the delays to which he had been subjected by the faults of the architect and his superintendent and the home authorities, as he might have done and had a right to do, but only asked for such part of said delayed time as, in complainant's judgment, would, under reasonable circumstances, enable him to complete the contracts, intending to ask for additional time, to which he was entitled, if it should be found necessary. The same idea was carried out in asking for the second and third extensions. The same conditions and reasons for granting the first extension continued to exist down to the time the second application was made and should have been the basis for a further extension, but instead of doing so, the home authorities went outside of the contract and, ignoring the reasons stated in complainant's application, upon its own responsibility granted an extension for a supposed cause not provided for in the contracts. In so doing, the home refused to give its judgment on the sufficiency of the reasons given by complainant for the extension of time, as it was bound to do under the contracts. Complainant was entitled to further extensions of time for reasons which the home authorities never did pass upon. No forfeiture of the contract could be declared because the contracts were not completed within the time limit, so long as complainant was entitled to an extension of time, provided for in the contracts, in which to complete the same. In other words, before the home managers could pass a judgment of forfeiture of the contracts they would have to first give judgment as to whether or not complainant was entitled to an extension of time under his application for same. What is said as to the first and second applications for extensions of time will also apply to the application of July 29, 1903, for a further extension of the time.

When Mr. Unkefer realized that he would fail to complete the work by August 15, 1903, he, on July 29, notified complainant that on August 5, 1903, he would terminate his position as agent or attorney in fact to complete said contracts, and on said date he quit and refused to proceed further with the work. This action on the part of Mr. Unkefer was without justification or excuse. It was a pretext on his part to give up work which he knew he could not complete within the time limit, and was done for the further purpose of having complainant's contracts forfeited, and having himself placed in charge of the work, where he could make large sums of money at expense of complainant.

When Mr. Unkefer had turned the control and management of the work back to complainant, the latter again assumed charge, and was making fine progress, when, on August 15, 1903, he was notified by wire that his contracts had been annulled and all amounts due him had been forfeited to the home.

Complainant charges that under his contract with the home, and especially under the $25.00 per day forfeiture clause, the latter had no right or authority to annul its mutual contracts with him on any grounds whatever, or to declare any amounts due him under the contract to be forfeited.

The work done by complainant was fully up to the specifications in the contracts.

Complainant was faithfully and diligently prosecuting the work, and would have hurried it to completion inside of ninety days had he not been interfered with by the home officials, who procured a restraining order on August 22, 1903, and thus caused the suspension of all work, which stood suspended until September 14, 1903, notwithstanding their claim it was so urgent for the work to go on.

IV.

Complainant shows that the attempted annulment of the contracts on the part of the home is void and ineffectual for the following reasons:

(1) The board of managers of the National Home for Disabled Volunteer Soldiers, in their regular official meeting,
36 where a quorum of the board was present, did not declare said contracts annulled.

(2) The board of managers, in their official capacity as a board, did not have before them a report of the architect (J. H. Freedlander) showing that in his judgment complainant had failed to prosecute faithfully and diligently the work in accordance with the specifications of the contracts, and therefore had nothing before them upon which they could legally annul the contracts on August 15, 1903.

(3) The architect (J. H. Freedlander), whose judgment, upon the question of whether or not complainant had faithfully and diligently prosecuted the work in accordance with the specifications of the contracts, was to control the action of the board of managers in respect

to annulling the contracts, had not been on the home reservation, near Johnson City, for five or six weeks prior to the attempt at annulment. When said architect was last on the home premises, the work was, and had been for some time, more than two months, under the control and management of Jno. G. Unkefer, who was selected for that purpose by the home authorities. The architect was not, therefore, in a position to give his own judgment, based upon his own knowledge of the facts, on this important question. The contracts contemplated, and the law required, the personal judgment of the architect (J. H. Freedlander), based upon the progress and character of the work, obtained by personal investigation at the time of action on the annulment. His high and important duties as arbiter between the conflicting rights of the contracting parties were judicial in character, and could not be delegated to another, nor could the information on which his judgment was to be formed be received in any other way than by personal investigation.

(4) The judgment of the architect was not his personal judgment, but was the judgment of another.

(5) The attempted annulment was not the act of Moses Harris, who does not claim to have done so, and not the action of the board of managers of the National Home for Disabled Volunteer Soldiers, as claimed by them and by Moses Harris, for reasons hereinbefore stated. It is not and was not, therefore, the action of either, and the attempted annulment is, therefore, ineffectual.

(6) Time was not of the essence of the contract. The failure to complete the buildings within the specified time was mainly the fault of the home and its architect.

(7) The home authorities took charge of one ward building of the group of buildings, and used it for storage rooms, so that it was impossible for complainant to complete the work therein, or even to work therein.

37 (8) The architect ordered and directed complainant to suspend certain part of the work pending the consideration of proposed changes of the original plans as to such work, and these questions were not decided at the time of the attempted forfeiture.

(9) The cause of the delay was the incompetency of the architect, which was known to the board of managers of the home, and not the fault of complainant.

(10) The work on the hospital group of buildings was prosecuted faithfully and diligently, and according to the terms of the contracts.

(11) Because the provision to annul the contract was waived, and abandoned and annulled by the later provision in the "Additional clauses" for the payment of $25.00 per day by complainant for each day required to complete the work after expiration of the time limit named in the contracts.

(12) At the time the contract was attempted to be annulled, complainant had pending before the board of managers an application for a further extension of time in which to complete the work, which had not been acted upon. Under the contracts he was entitled to the

fair and impartial judgment of the board of managers upon his application for extension.

(13) The extension of time, as granted, did not act and was not intended, as already set forth, to cover all the extra time to which defendant was entitled on account of the shortcomings of the architect and the home authorities, and other hindrances which were beyond the control of defendant, and due to no fault of his; all of which are provided for in the contracts.

(14) The failure to complete the work within the time limit was the failure of an agent of the home authorities own selection, namely, J. G. Unkefer.

(15) The appointment, upon the forced terms of the home, of John G. Unkefer, as attorney in fact, to execute the work was a departure from the terms of the contracts with complainant, and an abandonment of the right to insist upon the annulment and forfeiture provisions in said contracts; and defendant (home) can not thereafter, at its own will, return to the same to the prejudice and injury of complainant.

(16) The parties authorized by the contracts to annul the same could not delegate such power to another. The proper action, annulling the contracts, was not taken by the authorized parties, as provided in the contracts, and the judgment of annulment is therefore void and ineffectual for any purpose.

V.

38 Complainant shows that prior to August 15, 1903, four supplemental agreements for changes, extension of time, and for additional work had been entered into with the home, and several other proposed changes requiring additional time, work, and materials were, at the time of said attempted annulment, and had been for several days, under advisement and consideration, and complainant had been ordered not to proceed with certain portions of the work until the negotiations then pending for changes were decided upon. The proposed changes, if agreed upon, would have affected the other work and plans to some extent, so that the actual finishing of the work depended upon and would have to be done with reference to these matters. No definite action as to these proposed changes had been taken at the time complainant was stopped in the prosecution of the work. Complainant received no instruction as to this work after August 7, 1903, when he was ordered not to proceed further until the question of changes was settled. Complainant was not responsible for this delay.

In this connection, complainant shows that J. H. Freedlander, the architect, under whose direction the plans and specifications were drafted and prepared, and who has since been in charge of said work, is a resident of the city of New York. He had only been on the home reservation two or three times in the six months prior to August 15, 1903; on the first of these occasions he only remained about two

days. On the last occasion, about five or six weeks prior to August 15, 1903, he was on the home ground for one or two days.

He visited the home reservation only four or five times within the twelve months prior to the six months above referred to, and these visits were only one or two days' duration each.

The contracts contemplated that the architect would be competent in every way, fair minded, skilled in his profession, impartial, and free from prejudice. He was not of complainant's selection. He was the choice of the home authorities, and was given large powers, and was entrusted with the responsible duties of the position. The law guaranteed to complainant fairness, impartiality, and protection from fraud and wrongdoing, and upon this complainant is now forced to place his reliance.

Complainant shows that said architect has, by his course of proceeding, from time to time, worked great wrong and injury upon him, causing him great loss in time and money, and has caused delays which made it impossible to complete the work in the time limit. Many of the plans and specifications are crude and imperfect and could not be worked out in the construction of the buildings without material and important changes. The changes made necessary by his ill-considered and unfinished plans necessitated heavy addi-
39 tional expense and long delays, which the architect arbitrarily and unjustly imposed on complainant. He has been unfair, and his decision in the settlement of the question between the home and complainant was unfair and in favor of the home. His actions were the result of prejudice toward complainant, as well as a desire on his part to keep the cost of the building within the estimates he had made to the home, and which the home authorities were insisting he should do, and also to avoid responsibility for the changes in his plans made necessary in order to work them out, and which frequently involved heavy additional costs. In other words, to prevent the cost of the buildings exceeding his own estimates, and to save himself from criticism for defective plans, and for making the building cost more than his estimates called for, he imposed the burden of his own mistakes on complainant. He often failed to act promptly in the performance of his duties, when delays were injurious, almost ruinous, to complainant.

When differences would arise between complainant and the home, and when discrepancies were found in the plans and specifications, the architect's superintendent on the reservation was incompetent to settle the questions and solve the problems and would say that he had no authority from the architect to settle them and that such matters would have to be referred to the architect in New York City—consequently, reports would be sent to the architect in New York and long, unnecessary delays would result, which would frequently onerate complainant with additional expense.

The architect had no one on the home reservation to represent him except the party he employed as his superintendent, whose authority was restricted.

The architect employed one Hutton as superintendent to act for him in certain matters, placed him in charge of the work at the home when the work was commenced, in which capacity he acted for fourteen months and was then discharged as being incompetent.

A large amount of work done under the orders and according to the direction of said Hutton was ordered torn out by Freedlander, and the cost of replacing same, amounting to about $10,000.00, was unjustly imposed upon complainant. Although in this matter complainant was without fault, having followed the directions of the man placed in charge of the work, yet he was made to bear the loss of the architect's incompetent superintendent. Complainant is advised that he is entitled to recover this fund which he was unjustly made to expend.

Complainant shows that under the terms of the contract the home is responsible for the architect's actions; and wherein he at-
40 tempts to act by his superintendent, which, by the terms of said contract, he may do in certain matters, the home is responsible for the superintendent's actions. Complainant also shows that in the immediate direction of the work upon the grounds the architect's superintendent is given certain powers and authority, but when the time and occasion came for him (the architect) to pass upon any question affecting the rights of the parties in respect to the annulment of the contracts, his (J. H. Freedlander) personal knowledge and decision alone could be binding. Instead of acting in this manner, he has attempted to leave this important duty to others. The architect was without that personal knowledge of the work and materials employed and used by complainant and the manner in which he had prosecuted the work which was necessary for him to have in order to act intelligently and within the scope of his powers upon the important question involved.

In this manner arose the claim of the home that complainant had not complied with the conditions and requirements of his contracts, and upon this unfair and unwarranted claim defendants wrongfully attempted to terminate and annul the contracts, but in so doing they have, as complainant charges, breached said contracts.

In this manner defendants have attempted to justify their action of attempting to annul the contracts by relying, so they claim, upon the reports of the architect's superintendent, claiming the right to do so under clause "B" of the "General conditions and specifications" attached to the contract. This they cannot do for the reason that said clause in no way modifies or effects the provision of the contract itself for the judgment of the architect (J. H. Freedlander) upon the question of whether or not complainant had failed to prosecute the work faithfully and diligently and in accordance with the requirements and specifications of the contract. This power was not intended to be delegated to the architect's superintendent by section "B" referred to, and it is denied that such superintendent has power to determine the facts on which said judgment rests or to pronounce the judgment.

For several months prior to August 15, 1903, Mr. Freedlander, the architect, unjustly withheld estimates which should have been promptly made and paid, and frequently allowed only partial amounts due to complainant when he did make them. He frequently ordered the work already done to be torn out and rebuilt, at expense of complainant, in order to remedy defects and imperfections in his own plans, and forced the same to be done over the protests of and at a great loss of both time and money to complainant.

The architect would frequently change the plans after finding it impossible, by experiment at the buildings, at com-
41 plainant's expense and against his protest, to execute the work by them. In the canvas roof of the verandas and corridors alone he made and forced upon complainant alterations in the original plans which cost him more than double the original design for the same work. This was arbitrary and unreasonable, and was not contemplated in the contract. This is but one of many similar instances which will be shown in the proof.

At the time complainant was stopped by restraining order, the work was within ninety days of completion, and could have been completed by complainant at an additional cost of about $20,000.00. In this advanced condition of the work, the attempt was made to annul the contracts and declare forfeited over $67,000.00 due to, and unpaid, complainant. This unjust, unwarranted, and fraudulent decision and claim is most unconscionable, and is condemned by every sentiment of fairness and every principle of equity.

The would-be forfeiture, based, as it is, on the judgment of the architect, who had not been on the reservation for weeks, if not months, and, therefore, incapable of forming a just judgment of his own, is arbitrary, usurpatory, and a breach of the contracts with complainant.

VI.

Complainant shows that since he has been stopped by order of the court from going ahead and completing the contract, the home authorities have determined to complete the work, and to that end have put Jno. G. Unkefer in active charge and management of the work. It will strike the court as somewhat remarkable that this is the same Unkefer, who had been in control and management of the work for complainant for more than five months prior to August 15, 1903, and who was in control at the time the architect last visited the home, about the first of July, 1903, at which time he claims to have received the personal knowledge which was the basis for his action in pronouncing judgment that the work had not been prosecuted faithfully and diligently by complainant.

The home made a new contract with Mr. Unkefer, by which it bound itself to pay him 10 per cent on the cost of completing the work, for superintending and looking after the same. Complainant shows that this conduct on the part of the home is grossly improvi-

dent, and would work a great hardship on complainant. Complainant here calls upon defendant to produce said contract and file it with its answer to this cross bill. It puts the completion of the work in the hands of a man whom it has attempted to declare by its action, was not prosecuting the work faithfully and diligently.

42 It offers Mr. Unkefer a premium to make the work cost as much as possible, with the view of having the cost charged up to the complainant.

In the attempt to complete the work on the hospital group under the supervision of Mr. Unkefer, the home authorities, or those in charge of the work, have not followed the plans and specifications of the architect, but have made many changes, which will cost far more than the work would have cost under the architect's plans and specifications, which were made a part of the contract between complainant and the home.

These changes are radical and far-reaching, and were not contemplated by the architect's plans, and are not within the terms of said contract, even by the most liberal terms of construction.

Complainant shows that he is not responsible for more than it would have cost him to complete the work under the original plans by proper and judicious management.

Complainant enters his solemn protest against this improvident and reckless contract with Unkefer, and to the extravagant and wasteful manner in which it is being executed.

VII.

Complainant alleges that the sum due him is $297,185.91, and such damages as he may be entitled to, for the breach of the contract with him by defendant, less payments made to him by defendant, the same being $210,172.06, for which amount he sues.

Prayer.

The premises considered, complainant prays process for the National Home for Disabled Volunteer Soldiers and Moses Harris, general treasurer, returnable to the next return day of your honor's court, that they be required to answer this cross bill, but not under oath, which is waived. That a decree be rendered in favor of complainant against defendant for the unpaid balance of the contract prices and the amount due complainant for extra labor and material, and for the damages sustained by complainant by reason of the breach by defendant of the contracts with him to construct said buildings on its reservation at Johnson City, Tennessee.

That such other relief be decreed complainant as may be warranted and for general relief.

J. E. PARRISH.

HARR & BURROW, Sols.

STATE OF TENNESSEE, *Washington County:*

J. E. Parrish personally appeared before the undersigned
43 officer of the law, and made oath, in due form of law, that the facts stated in the foregoing cross bill are true, according to the best of his knowledge, information, and belief.

[SEAL.] FOY W. DULANEY,
Law Court Clerk.

Law Court at Johnson City, Washington County, Tennessee.
Filed December 3, 1903.

J. T. CARTER, *Deputy Clerk.*

Answer to cross bill.

The Circuit Court of the United States, Northeastern Division of the Eastern District of Tennessee.

J. E. PARRISH, COMPLAINANT,
vs.
NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, AND Moses Harris, general treasurer of same, defendants. | In Equity.

Answer of the National Home for Disabled Volunteer Soldiers, one of defendants to the cross bill of J. E. Parrish.

Now comes the National Home for Disabled Volunteer Soldiers (being the sole defendant thus far served with process) and files this, its answer, to the cross bill filed in the above-entitled court and cause by J. E. Parrish:

This respondent, saving and reserving to itself all benefit and advantage of exception to the many errors and insufficiencies in the said cross bill contained, for answer thereto, or to so much thereof as respondent is advised it is material for it to answer, answering, says:

So far as the cross bill correctly abstracts the original bill filed herein by this respondent and another on August 22nd, 1903, the recitations in respect thereto are admitted; but said original bill and the answer thereto, being parts of the record of this cause, are here referred to by respondent as best showing their own allegations denials, prayers, etc.

And now representing the affirmative grounds for relief set up by the cross-complaint:

I.

On the 19th day of November, 1901, a contract was entered into by and between cross complainant Parrish and Moses Harris, general treasurer, the latter contracting for and in behalf of this respondent, in which cross complainant Parrish agreed to furnish all material, labor, etc., for the construction complete of the following portions of what is denominated the hospital group of the

44 Mountain Branch, N. H. D. V. S., to wit: The administration building, the kitchen building, the two ward buildings, the corridor and the fountain in the center of the court. Plans, drawings, and specifications, and provisions in relation thereto, were made parts of the contract, as were also the advertisement for bids, the proposals to bidders, etc. A true copy of said contract, certified by the general treasurer, has already been filed in the cause (August 31st, 1903), and same is here referred to and made part of this answer. Said contract called for the payment to said Parrish therefor of the sum of $183,497.00.

On the 8th day of March, 1902, the same parties entered into a contract for the construction complete of the two additional ward buildings (thus completing the hospital group), said second contract calling for the payment of said Parrish of the further sum of $91,694.00.

By supplemental agreement between the same parties, it was agreed that said Parrish should be paid on account of the use of larger slate, on the first contract (November 19th, 1901), the sum of $200.00; and for the same on the second contract (March 8th, 1902) the sum of $100.00, making an aggregate sum for change of size of slate, $300.00.

Under the terms of the two contracts, there was a provision for the increase or decrease of masonry, excavation, etc., and estimates for extra work performed under said provision by said Parrish have been duly allowed as follows, to wit: Under the first contract, $2,989.34; and under the second contract, $1,219.00; or a total under both contracts of $4,208.34.

To summarize: Had Parrish completed his said contracts in conformity therewith, he would have been entitled to receive payment of a grand total of $279,699.34, from which there would have been deductable, however, various credits in favor of the cross defendants and against said Parrish.

Respondent denies the validity and justness of the various items of charge made by cross complainant and claimed by him to constitute the alleged sums of $20,940.67 and $1,054.24, and to be due him as extras, except, of course, the items admitted hereinbefore.

The only allowable extras are those set forth above, and here again, to wit: Extra, filling sink holes, $188.65; extra, concrete footings, $2,399.76; extra, brick masonry, $1,619.93; making the total above recited of $4,208.34, and the extras for slate, aggregating $300.00.

Respondent shows that a large number of the items of charge set forth by cross complainant as parts of said demands of $20,940.67 and $1,054.24 are for work and material of cross complainant in attempts to remedy defective work that failed to pass the architect and inspectors and are manifestly unjust.

45 Respondent alleges that said claims for extras are not allowable for the additional reasons:

() They have not been estimated by the architect, or adjudged allowable by him, as must be done under the contract.

(b) They have not been stipulated for or "agreed upon in writing by the contracting parties," as must be done under Section VII of the construction contracts, which provides that there must be such written agreement, "setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted," etc., as a condition precedent to the liability of the defendants; also as must be done under Sec. VIII of said contracts, which provides that no claim whatever shall at any time be made for or on account of extra work or material, unless such extra work or material shall have been expressly required in writing by the general treasurer of the N. H. D. V. S., the prices and quantities having been first agreed upon by the contracting parties, and this respondent pleads and relies upon these plain contract provisions in defense, as well as the contract of May 6, 1903, which embodies provisions of the contract of April 14, in relation thereto as below set forth.

The allegations of the cross bill as to the recitations of the construction contracts, so far as they do not conform to the copy of the contract on file, as aforesaid, are denied. The contracts are relied upon to speak for themselves.

II.

It is denied that cross complainant was delayed in the commencement of the work by any act or default of the architect, and it is untrue that, beginning on December 16th, 1901, and continuing until the restraining order in this cause was granted under the original bill, cross complainant was in the prosecution of the work in good faith and with all possible diligence under very adverse circumstances.

It is expressly denied that nine-tenths of the entire work, or anywhere near that proportion, was completed when the restraining order was granted and that it was equally untrue that cross complainant would have completed the "group" within sixty to ninety days had he not been stopped; and equally untrue is the allegation that the work of completion could have been done by cross complainant Parrish at a cost of not exceeding $20,000.00. The recklessness of said Parrish in iterating and reiterating this under oath is shown by the fact that the cost of completing said "group" since his contract was annulled has reached a figure above five times that sum.

Respondent denies the correctness of the various schedules
46 as to labor and materials and sums due or payable referred to in the cross-bill.

Respondent shows that the allegation in the cross bill as to the aggregate amount paid Parrish on said work is erroneous to the extent of $5.00, the true amount being $210,177.06.

It is denied that there is yet or ever was due cross complainant for work done prior to the granting of the restraining order the sum

claimed, or any other sum whatever. If any portion of said items represent work done under and authorized, estimated, and allowed under the terms of the contracts aforesaid, they have been paid to said Parrish in due course, and such payment is pleaded.

III.

It is true that, on October 24th, 1902, cross complainant was granted an extension of time until May 15th, 1903, in which to complete said contracts. The contracts of extension are appended to the aforesaid certified contracts, and are here referred to for their full terms. But it is untrue that up to said date nothing had been done by said Parrish that gave cause for serious frictions and delays; and the fact that the work had not been completed within the original contract limit of time was itself cause for annulment of said contracts had the home authorities not seen fit to grant said extension.

The facts are that objections had been made as to the manner in which said Parrish was carrying on the work, and serious criticisms made to him as to improper and defective work, but such objections and criticisms were met with promises of amendment of his course of action and his work on the part of said Parrish, who professed a willingness to more nearly comply with the terms of his contracts and push the work to completion; whereupon the extension was granted. But said extensions were purely of grace; no valuable consideration passed from said Parrish to support same, as is contemplated by the law governing the extension of contracts effecting public moneys, such as these were. It will be noted that the full extension period asked by said Parrish was granted to him.

It is also true that, on May 6th, 1903, agreements were entered into providing for a second extension of time for the completion of both of said construction contracts, said agreements being likewise filed in this cause and here referred to for full terms thereof.

It will not escape the notice of the court that the cross bill is silent as to what occurred touching said Parrish's work between the dates of the two extensions, between October 24th, 1902, and May 6th, 1903. The silence is a purposed one. A true recital of the occurrences during said period cannot but reflect discredit upon
47 cross complainant, who had just been awarded the six months' extension asked by him. Certain it is that those occurrences and their after consequences have proved veritable nightmares to the authorities of the National Home for Disabled Volunteer Soldiers, who had to do with them, from headquarters down.

In order that the court may understand the true situation and the extension agreements in their light, respondent states:

Shortly after said Parrish procured the grant of the first extension—almost immediately after—he became dilatory and again disposed to do defective work with defective materials and to depart from contract specifications. Complaints as to this came to respondent's head-

quarters through two different channels—the architect and respondent's own superintendent of construction, Gen. Jno. T. Richards.

Matters went from bad to worse, until in December, 1902, an inspection of the hospital group was made by respondent's said superintendent of construction, when numerous and serious defects in construction were found, among the many being brick walls, which upon being tested were found to be hollow; arches were very insecure and cracked; parapet walls not properly laid, or laid with improper mortar, and at places hollow; stone steps placed on wooden shores (2 x 8 plank), which were hidden by stone steps; walls built much out of plumb; inferior lumber used; window openings built too low, and sash attempted to be cut down to fit same, rendering same defective, etc., etc.

Further, said Parrish was found to be without adequate or reliable superintendence on his side work.

So defective was the work that the said Parrish was notified that he must cease work, as same would be rejected by the home authorities under a provision of the contract giving them that power. The matter of amendment of the said construction contracts was then considered by the authorities of the home at headquarters, but they were so anxious to get the buildings completed and occupied by veteran soldiers, who were pressing for admission, that they were unwilling to take this step until after all other means should have failed, and suspension of the work being defectively executed was resorted to rather than a total annulment.

Cross complainant, Parrish, acknowledged his shortcomings at this time (January, 1903), and made many fair promises of amendment; and work of construction was resumed on January 13th, 1903. Respondent was hopeful that said Parrish would live up to his promises thus solemnly made, but instead of doing so, he continued in his previous course; and accordingly, on February 10th, 1903, the superintendent of construction reported the unsatisfactory condition
48 at the hospital group; and on February 26th–27th, 1903, the architect made an inspection of the group, and at that time, in a written instrument lodged with the home authorities, declared that, in his judgment, the said Parrish had failed to prosecute diligently the work in accordance with the specifications and requirements of the contract. The annulment of the contract at this time was seriously considered, but the authorities were still averse to the taking of this step, except as the unavoidable alternative.

To prevent an annulment at this time (February, 1903), cross complainant, Parrish, executed to his partner in the work of constructing other buildings on the Mountain Branch reservation, Jno. G. Unkefer, an irrevocable power of attorney, giving said Unkefer plenary powers to go forward and conduct the further construction of the hospital group. The home authorities had by this time lost faith in said Parrish, and were unwilling to trust him in any promise or agreement he would make looking to the amendment of defective work and methods or to expediting the completion of the group.

When this power of attorney was executed and knowledge of it came to the authorities at headquarters, and said Unkefer entered upon execution of the power of attorney, the annulment of the contracts was forborne.

But said Parrish was not long content to let matters run thus. In April, 1903, the work of said Unkefer on the hospital group was brought to a standstill by said Parrish's refusal to furnish him money with which to prosecute the work, and he declined to permit said Unkefer to use funds payable to said Parrish from the firm of Parrish & Unkefer; and said Parrish went to the extent of notifying workmen on the hospital group that their continuance at work would be at their own risk. Respondent was advised that this time (April, 1903) by its superintendent of construction that the contracts of said Parrish should be annulled. A like opinion was telegraphed to headquarters by W. P. Brownlow, that member of the Board of Managers of the N. H. D. V. S. having the more immediate supervision of the Mountain Branch at Johnson City. On the same day the president of the board of managers wired to Johnson City that annulment was impending. To prevent this, and at the last moment, said Parrish receded from his position and agreed that the defective work should be amended; and, confessing his financial inability to further finance the construction and repair of the hospital group, he executed a further power of attorney to said Jno. G. Unkefer, authorizing and directing him to use said Parrish's portion of funds of the firm of Parrish & Unkefer in the further construction and repair of the hospital group and in the remedying of the defective work
49 complained of, as well as other defects thereafter required to be amended by the architect—"Also as to bring said hospital group of buildings to a point of completion under the contract and specifications."

It is denied that respondent, or anyone for it, caused his contract of power of attorney to said Unkefer to be executed by said Parrish. Said Parrish may have executed same unwillingly, but he did so as his own act, in order to stay an annulment. It will be recalled that said Unkefer had already been placed by said Parrish in charge of the construction work on the hospital group by the original power of attorney, executed February 28th, 1903. This respondent's connection with this original power of attorney was that of not objecting to the appointment of this agent in fact (the hope being that it would obviate further friction and trouble) but also refusing to be any party to that contract.

However, when said Parrish evidenced a purpose to obstruct said agent in fact and to refuse him the power to remedy defective work this respondent did impose it as one of the terms of the second extension (granted May 6th, 1903) and made it a part of the consideration thereof, this provision: "That said J. E. Parrish agrees that Jno. G. Unkefer shall continue in charge and management of the work specified in said contract and supplement agreement under the terms of an agreement now existing between the said J. E. Parrish and the

said Jno. G. Unkefer, until such work shall have been fully completed." The officials of the home felt that said Parrish would, whenever and wherever possible, avoid and evade his agreements and would continue his efforts to render nugatory the powers of attorney; and, to be frank, they had lost faith both in his skill and in his disposition to execute the construction contracts; he had confessed several times and in several ways his financial inability to do so.

The second power of attorney or contract between said Parrish and said Unkefer had been entered into on April 14th, 1903, nearly a month before the extension contract was entered into. The attitude of the respondent's authorities, on April 13th, 1903, was to annul the construction contracts if satisfactory agreements were not made; and when the contract of April 14th, 1903, between Parrish and Unkefer was entered into, it availed to stay annulment. The extension of May 5th, 1903, would not have been granted had not the provision respecting the contract of April 14th been embodied in it.

This respondent did not select said Unkefer to complete the work. It assented to his selection by said Parrish, as above outlined. The fact that the said Unkefer did not complete the group within the renewal periods was no fault of respondent, and, it is believed, no fault of said Unkefer. Much of the time was spent in attempts to remedy defective construction work done by said Parrish. As will be later shown herein, he was embarrassed and obstructed by said Parrish and finally forced out of the agency in fact.

Touching the statement in the cross bill that said Parrish in his first application for an extension of time did not ask for a period adequate to cover all delays to which he claims to have been subjected: It is denied that he was subjected to any delays; if so, then not to delays that by contract were to work any change in or extension of the contract.

If cross complainant did not ask for sufficient time, it was his fault; at the time he expressed the hope that he would not need the time asked and granted. In addition three months more were given cross complainant under the second extension.

It is denied that the contracts could not, under these circumstances, be annulled. It matters not on what ground the extension was asked; the amount of time requested was granted, which time would suffice for one reason as well as another.

Touching the discontinuance by Jno. G. Unkefer of his work as attorney in fact on the hospital group, respondent can only express surprise at the allegations of the cross complainant. He seeks to leave the impression that said Unkefer voluntarily and for ulterior motives resigned his agency in fact when the facts are that said Parrish, by a studied course of conduct towards his agent, by accusation and innuendo that said agent was untrue to him and was taking advantage of him, forced the resignation of said Unkefer, unless he were willing to retain the agency and resign all self-respect.

Said Unkefer was ready and willing to carry forward the work, even after the wrongful accusations, if only Parrish would ask him to do so, and he so stated to Parrish more that once, but said Parrish declined to do so and to withdraw his accusations. Cross complainant Parrish was importuned by the secretary of the Union Surety & Guaranty Company (his surety on the bonds for due construction of the group) to permit Unkefer to go forward and to disregard the resignation, but said Parrish declined; hot words passed between Parrish and his surety because Parrish would not assent. Cross complainant was at the same time informed by his surety that the result of his refusal, if persisted in, would be the annulment of the contracts of cross-complainant.

Cross complainant was urged by the respondent's superintendent of construction and others to permit the work to go forward under Unkefer but without success.

51 In the face of these facts cross complainant wrote the general treasurer announcing Mr. Unkefer's resignation and stated that he "was very sorry of Mr. Unkefer's action and procedure."

The purpose of cross complainant in bringing about this resignation and in refusing to ignore same is charged to be to regain possession of the hospital buildings, in an effort to gain some supposed tactical or legal advantage. Cross complainant at once began to bombard the architect and general treasurer with letters plainly dictated or written for legal purposes. On August 10th, 1903, one letter was written; on August 11th, two such letters were written; on August 14th, four; on August 15th, three; on August 19th, two; on August 21st, one.

The imputation that said Unkefer terminated his agency for said Parrish for the purpose of having himself placed in charge of the work on the hospital group, where he could make large sums, this respondent is able to refute of its own knowledge, since said Unkefer declined to entertain a proposition from this respondent for the completion of said work, and only did so at the repeated solicitation of respondent. He was, from his acquaintance with that work under said Parrish, as well as from his general experience as a contractor, deemed by respondent the fittest person to place in charge of the construction work.

It is true that when said Unkefer ceased to act as agent under power of attorney said Parrish assumed charge for the few days intervening between that date, August 5th, 1903, and the date on which his second extension period expired, to wit, August 15th, 1903; but it is denied that he was making fine progress; the contrary is true. He was proceeding quite promptly to do defective work. It is denied that he was faithfully and diligently prosecuting the work; the construction force employed was gradually diminishing quantity. It is untrue that cross complainant would have completed the group inside of ninety days; he must have spent no small portion of time in advising with attorneys and writing letters to make a record. One

of these letters of his assured respondent that it would be a matter of impossibility to complete the group within sixty days.

It is denied that the work done by cross complainant was fully up to the specifications of the contract.

IV.

It is denied that the annulment of said contract was ineffectual or invalid for any reason.

(1) The annulment was based upon a certificate of the supervising architect; and based upon his personal knowledge, to which was superadded information obtained by him through his superin-
52 tendents. Under the "General conditions of the specifications," clause (B), the word architect is made to include J. H. Freedlander, acting either directly or through any assistant duly appointed by him. It was not contemplated, neither is it customary, for an architect of a work of the magnitude of this scheme of respondent's to be at all times or for most of the time on the work in person; the intervention of assistants is essential. The architect had, in February, 1903, in writing, given his opinion that the contracts should be annulled for cause. The architect had made a visit and personal inspection of the group the month previous, and had remained for several days, and he knew definitely the condition of affairs; and his judgment was his own, merely confirmed by that of others.

So far as the architect was concerned, he had consistently favored an annulment on and after February 27th, 1903. There were two certificates from the architect warranting annulment; and the act of annulment may well be based upon or referred to either. It is true that cross complainant warded off annulment at the time under the architect's February certificate by making promises which he afterwards breached. When he breached those promises he reinstated the home authorities to the rights to do that which they would have done but for the making of those promises—the right to annul under the certificate of February as well as under the certificate of August. Annulment under either or both certificates was valid.

(2) The act of annulment is prescribed in terms by the contract to be lodged in the party of the first part—Moses Harris, general treasurer: "The party of the first part, or his successor, legally appointed, shall have the power to annul this contract," etc. The general treasurer, as an official, comes into direct and immediate contact with the administrative details of the board of managers' affairs, with his office at headquarters. The respondent corporation is eleemosynary, and its members of the board of managers reside in widely separate portions of the Union, meetings being occasional only. It is therefore purposely contracted that the power to annul should be with the general treasurer. However, the general treasurer did consult concerning the step with the president of the board of managers, all of whom concurred. It is a fact that the board of managers

did not, as a body convened, resolve, prior to annulment, upon annulment of said contracts; this was not requisite. However, said Parrish having in his answer to the original bill called in question the fact that the board of managers were favorable to the action taken in annulling the contract, that body, in regular session, thereafter passed the following resolution:

53 "*Resolved*, That the action of the president of the board directing the general treasurer to annul the contracts of J. E. Parrish for the construction of the hospital group of buildings at the Mountain Branch of the home, dated, respectively, November 19, 1901, and March 8th, 1902, in accordance with the terms of said contracts, to date from August 15th, 1903, is hereby approved."

The president of the board of managers is empowered to act during recess for the board; and he and the general treasurer were in accord in the annulment of said contracts. The act of annulment was based upon the judgment of the architect, as aforesaid.

(3) It is denied that there was any suspension of any or any material part of the work by the architect; if there was, it was an act in due course under the contract, and could not work a loss of the right and power to annul for causes affecting other portions of the work.

(4) The cause of the delay in completion was not incompetency of the architect: the applications for extensions were not based upon any such ground, and two of such applications wre granted cross complainant. In so far as he complained of delay on account of the plans or acts of the architect (which complainants were themselves baseless), cross complainant received ample compensation in the extensions granted. It is worthy of notice that, in the cross complainant's second application for extension, dated May 2nd, 1903, wherein, after a three months' extension, he states: "I regret very much to ask for this extension, because of the promises already made you when the other extension was asked for, but circumstances beyond my control have prolonged the completion of the job." No contract or other ground therefor was urged. Further, at this time, said Parrish, for the purpose of complicating the situation, or for some reason most peculiar in its nature, maintained an attitude of refusing to ask at all for the second extension, and only did so when he was brought to see the full significance of his remarkable attitude. Further, in cross complainant's application for a third extension of sixty days, under date of July 29th, 1903, which was made after his conduct had forced the resignation of said Unkefer as his representative, said Parrish states no contract ground for extension; neither does he give as reasons the grounds, or any of the grounds, now set forth in the cross bill. It is true that this last application was in the hands of the general treasurer at the time the contracts were annuled, but the act of annulment itself was itself tantamount to a disallowance of the application, if indeed, any action thereon was demandable as of right by said Parrish, which is denied.

(5) The first and second applications for extensions were
54 granted, as above stated, for the exact periods asked for by said Parrish, and they did not proceed upon the bases now at this late date so unjustly urged by him.

(6) The failure of the cross complainant to complete was no tdue to the home's selection of Jno. G. Unkefer, as already shown, nor, it is believed, to said Unkefer; his nomination by said Parrish and the contract recognition thereof by the contracting parties in the extension agreement of May 8th, 1903, did not work as an abandonment of the right of annulment. If there was any departure from the original contract, it was one assented to as a part of the original contract by cross complainant himself.

(7) It is denied that the provision in the "Additional clauses" for $25.00 per day on account of noncompletion of the building within the time limit waived or overruled the preceding clause giving the power to annul the party of the first part. The later provision is but a rule for the measurement of damages in event the annulment clause is not resorted to and the contractor is left in charge.

(8) The home authorities did use a portion of the hospital group for the storage of certain supplies that were accumulating; but this was done without any sort of injury to or embarrassment of cross-complainant, and was done after the consent, through his agent, of said Parrish, and of said Parrish himself was obtained. The necessity for such storage was an incident to cross complainant's failure to complete, according to agreement.

(9) Time was the essence of the contracts. The "Proposals for bids," made a part of the specifications and the contracts, upon knowledge of which said Parrish bid and contracted, sets forth: "Bidders must state in their proposals the time within which they will fully complete the work described hereinafter, and the statement will be taken into consideration in the awarding of the contract, and the time mentioned for completion will be made an essence of the contract." The time stipulated for completion was that named by said Parrish in his bid; and it was embodied in the face of the contracts. Further, by operation of law, independent of said provisions, time was the essence of the contracts.

(10) The work on the hospital group was not prosecuted faithfully and diligently and according to the terms of the contract. The departures and delinquencies were so numerous as not to be enumerated in this pleading.

V.

It is denied that there were any agreements or proposals for changes that operated to delay cross complainant. The con-
55 tract contemplates that there will be changes, and the original contract limit of time for completion, and the period of each extension, was agreed upon in view of such probable changes; and

the claim that the contractor was, in point of fact, embarrassed in the prosecution of the work, as a whole, by any change made or proposed, is untrue.

It is admitted that the architect, J. E. Freedlander, resided and resides in New York City, where his office, as cross complainant well knew; but the allegations respecting the number and duration of his visits to the Mountain Branch are denied.

The architect was, of necessity, named in advance of the letting of the bids on the hospital group; the proposals for bids so stated; he is an architect of high standing and repute, and was given those powers that are customary to be lodged in an architect.

Respondent denies that the architect has, of purpose or in fact, worked great wrong or injury upon the cross complainant, or been prompted or controlled by prejudice or unfairness, or any of the ulterior motives attributed to him in the cross bill. It is denied that any changes whatever, and particularly any material or considerable changes, were made in the plans, nor were any changes made in the work because of the plans being defective or without warrant, as charged. The said Parrish knew, and admitted, at the outset, that "the plans and drawings and the specifications were not complete in every detail, and that they were to be construed as showing the purpose and intent only"; and that the architect should, "in all cases, decide every question concerning the interpretation of the drawings and specifications, and his estimate and decision shall be final and conclusive on the contractor."

Early in the construction work the said Parrish began a course of conduct that disregarded the power of the architect, and evinced a purpose not to be bound by the plans, specifications, or architect. When called to account for defective materials, work, and methods, he would disregard advice, persuasion, and instructions, and in many instances would evade compliance by stating that if he were left alone he would remedy the particular matters then in question, and thereafter fail and refuse to do so. He almost invariably refused to amend defects, and when he was finally forced, in certain instances, to do so, he would claim that he was being persecuted and outraged. Cross complainant, by his own conduct, brought upon himself a very considerable loss in the wilful doing of defective construction work, with the result that it would have to be torn down or repaired later, at a loss of money to said Parrish and of time to him and the home. In so far as the architect would not pass his defective
56 work, the architect was, according to said Parrish, prejudiced against him.

So far as this respondent is concerned, cross complainant well knew that, under the contract, the cost of remedying such work (let that fault lie with whomsoever it will) could not be taxed against the home, unless authorized by its officials in writing. The major portion, if indeed not all, of the matters complained of in the somewhat vague charges of the cross bill (such as work on and about the verandas, corridors, etc.), was, by written contract, stipulated

and agreed by said Parrish to be defects that must be remedied by him under the decision and supervision of the architect; and that said matters are, therefore, closed incidents. When said Parrish thus submitted to the decision of the architect, he procured the extension he asked for in consideration thereof. Now, having had the benefit of the extension so asked and granted, he disregards his contract, reverts to these old matters, and seeks to recover of this respondent his expenditures in so remedying said defective work. All of the matters complained of have been settled by memorandum or contract touching same.

It is denied that long or undue or unanticipated delays were occasioned cross complainant by discrepancies in the plans and specifications. If there were such, they were more than covered by the extensions granted cross complainant.

It is denied that F. A. Hutton, superintendent of the architect, was incompetent and was discharged for incompetency; and it is denied that work condemned was done in accord with said Hutton's instructions, or in accord with the contracts. The annulment of the contracts was not confined for causes to acts set forth by cross complainant as the causes, but the authorities of the home, from the president down, including Moses Harris, general treasurer; W. P. Brownlow, local manager; John T. Richards, superintendent of construction, all concurred in the judgment that further efforts to get the hospital group completed by said Parrish under the contracts and specifications was impossible, and that the contracts should be annulled, and so announced themselves at the time. Their occurrence, in full force with the architect and the architect's superintendents, is believed not to have been part of the conspiracy to "injure, oppress, and defraud" the cross complainant. In fact, the situation had reached the intolerable stage. Cross complainant Parrish was breaching the original contracts, the extension contracts; was insubordinate after solemn promises to amend; was breaching the provision against subletting and transferring his contracts without consent; was in litigation with one Garland employed by him to lay brick in the hospital group walls; was in litigation
57 with Adams Bros.-Paynes Co., a corporation that had contracted to make brick for said Parrish; was threatening his partner, Jno. G. Unkefer, with litigation and receivership of the affairs of his own firm of Parrish & Unkefer, contractors on the power house and barracks buildings.

The home authorities were sincerely averse to the taking of the stringent step of annulling; the proof will show that that step was postponed as the last alternative and only taken when it seemed to be the last alternative. More than fifteen other buildings have been in process of construction on the Mountain Branch Reservation, under the supervision of other contractors, and they are proceeding, and many of them are being now completed, without friction, bickering, or insubordination. If the architect's plans and superintendence prove adequate on all of these, it is at least passing strange

that they so woefully fail when tested on the one building contracted to said Parrish.

It is denied that estimates were unjustly withheld to compensate the home for the loss growing out of said Parrish's breaches of the contracts. The claim the $20,000.00 would complete is absurd, in view of the fact that it has taken above $100,000.00 to do so.

VI.

Respondent believes and charges that the resumption of work on said group by said Parrish, in August, 1903, was colorable an attempt to play for advantage, knowing, as he must have done (if he be one-half skilled as a contractor), that he could not finance the work to completion.

Cross complainant, in the answer filed by him to the original bill of the home, sets forth "that he is not financially able to go forward and complete said work unless he is paid something on the amount due him under his contract with the home." And a like statement is made by said Parrish in a pleading of his in the chancery court at Johnson City against the home, and in the power of attorney executed to Jno. G. Unkefer on April 14, 1903.

It will therefore be seen that the default in construction would have been made by said Parrish unless this respondent had made the mistake of going against the judgment of the architect, the superintendent of the construction, and the general treasurer and paid to said Parrish moneys that should be withheld.

It is, of course, true that respondent took charge of the group after annulment, and, after the order of the honorable court sustaining its injunction based upon the annulment, it proceeded to complete the buildings under the contract and the advice of the Treasury Department at Washington.

58 An unsuccessful attempt was made to get the surety of Parrish to complete the building; as before stated, an effort was made to get Jno. G. Unkefer to take charge, and at the insistence of respondent he agreed to do so, though both respondent and the said Unkefer foresaw that cross complainant would lodge a criticism against the step. This respondent was led to so let the contract by these facts: The said Unkefer is a skilled contractor; he had brought satisfactory results in his sole management of the construction of the barrack buildings and power house let to the firm of Parrish & Unkefer; he had become acquainted with the details of construction work on the hospital group under said Parrish, which knowledge would be valuable in carrying same to completion; and respondent was persuaded, after inquiry, that the charges and insinuations made against said Unkefer by said Parrish, in court and out, touching said Unkefer's dealings as said Parrish's agent, were untrue and unfairly made.

Accordingly, the contract was made with Jno. G. Unkefer to carry forward the work. It is the usual contract in such cases; the com-

pensation is the usual per centum paid for the service called for, and is but fair compensation for the work of supervision and financing. That it worked any hardship on said Parrish was a matter for him to consider when he was besought not to invite the annulment; it is no great hardship for 10 per centum to be paid for the trouble of supervision, keeping accounts, providing the considerable funds required to carry on the work.

Respondent files herewith, as Exhibit "A," a true copy of the said contract with Jno. G. Unkefer. Under same all purchases of material and use of labor has been under the control and supervision of the home and not at all the will of the contractor. An earnest effort has been made by respondent to save said Parrish as harmless as might be; every dictate of fair dealing and, for that matter, of self-interest prompted this course on respondent's part. Respondent shows that said Parrish was with great difficulty persuaded to save himself harmless by selling for the building aforesaid the unwrought material he had on hand at the time of annulment, although his refusal to do so would have left much of it quite worthless on his hands.

It is denied that the prosecution of the work after annulment of the plans and specifications have not been followed. If any changes have been made, the contract and specifications contemplate that such may be made from time to time; and if any changes are so far a departure from the plans and specifications as to be, in fact or equity, an extra respondent will not insist that cross complain-
59 ant be onerated with the cost of same. That radical and far-reaching changes have been made is untrue.

The mode of doing the work is prescribed by the contract and the act of Congress therein referred to, and respondent is advised that settlement for work since annulment must proceed on the statutory basis.

VII.

Respondent denies that there is due cross complainant any sum whatever. On the contrary, after the retention of all sums withheld from said Parrish as the work progressed are applied there is a large sum due to this respondent from him, as already indicated.

All of which respondent is ready to verify by proof, as the honorable court may direct. And respondent prays to be hence dismissed with reasonable costs and charges.

NATIONAL HOME FOR DISABLED VOL. SOLDIERS,
By JOHN T. RICHARDS, *Assistant Inspector-General.*
KIRKPATRICK, WILLIAMS & BOWMAN, *Solicitors.*

Filed January 30, 1904.

J. T. CARTER, *Deputy Clerk.*

The Circuit Court of the United States, Northeastern Division of the Eastern District of Tennessee, at Greeneville.

J. E. PARRISH, COMPLAINANT,
vs.
NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS and Moses Harris, general treasurer of same, defendants. | In Equity.

The answer of Moses Harris, general treasurer of the National Home for Disabled Volunteer Soldiers, to the cross bill of J. E. Parrish.

Now comes Moses Harris, general treasurer, and files this his answer to the cross bill filed herein.

I.

Reserving the benefit of exception to said cross bill for its errors and insufficiencies, this respondent, by way of answer, hereby adopts for himself the answer and defenses made to said cross bill by his codefendant, the National Home for Disabled Volunteer Soldiers, as fully as if they were here repeated in extenso.

60 II.

This respondent, for further answer, denies the several allegations of the cross bill, as fully as if same were fully recited and denied.

All of which respondent is ready to verify, by proof, as the honorable court may direct. And respondent prays to be hence dismissed with reasonable costs and charges.

MOSES HARRIS, *General Treasurer,*
By Solicitor.
KIRKPATRICK, WILLIAMS & BOWMAN, *Solicitors.*

Filed March 24, 1904.

J. T. CARTER, *Deputy Clerk.*

Amended and supplemental bill.

The Circuit Court of the United States, Northeastern Division of the Eastern District of Tennessee, at Greeneville.

NATONAL HOME FOR DISABLED VOLUNTEER SOLDIERS et al., complainants,
vs.
J. E. PARRISH AND UNION SURETY AND GUARANTY Company, defendants. | In Equity.

The honorable judges of the Circuit Court of the United States in and for said district:

The National Home for Disabled Volunteer Soldiers, a body politic, incorporated by act of Congress of the United States of

America, and not a citizen or resident of the State of Tennessee, and Moses Harris, general treasurer thereof, a citizen and resident of the State of New York, and not a resident or citizen of the State of Tennessee, file, by leave of court first obtained, this amended and supplemental bill, or original bill in the nature of a supplemental bill, against J. E. Parrish, a citizen of the State of Virginia, a resident and inhabitant, doing business in the county of Washington, State of Tennessee, and within the Northeastern Division of the Eastern District of Tennessee.

I.

Complainants respectfully show to the court that on August 22nd, 1903, they filed an original bill in this court and cause against defendant, J. E. Parrish, stating therein, among other things, that said Parrish had entered into contracts for the construction of the hospital group of buildings at the Mountain Branch of the National Home for Disabled Volunteer Soldiers, at Johnson City,
61 Tennessee; that said Parrish had failed to complete the construction of said buildings within the time allowed by the contracts and extensions thereof; and, further, that, under a power granted in said contracts, the same had been annulled, and that complainants had taken possession of the said buildings for the purpose of completing same under the contract provision to that end; and that said Parrish, in disregard of the rights of complainants, was persisting in attempting to occupy the buildings and work on the same; that said Parrish was claiming that large sums were due and payable to him from the complainants, but without grounds therefor; and said bill contained a prayer for an injunction to inhibit said Parrish from interfering with complainants in their possession of and work on said buildings; and that the court decree an accounting upon the proper basis for settlement of the disputed claims of the parties; and that general relief be awarded complainants.

On August 31, 1903, said defendant, Parrish, filed his answer to said bill and resisted the granting of the injunction prayed for therein and moved for a dissolution of the restraining order that the court had granted against said Parrish when the original bill was filed. Replication to said answer was filed.

On September 3, 1903, the court filed its opinion, holding that the motion to dissolve the restraining order should be disallowed and the injunction granted as prayed for.

Thereafter, on December 3, 1903, said Parrish, by leave of court, filed a cross bill, alleging a breach of the construction contracts by complainants and seeking to recover the sum of about $87,000.00 as damages.

On January 29, 1904, the National Home for Disabled Volunteer Soldiers filed its answer to said cross bill, and said Parrish has filed replication thereto. Said Moses Harris, general treasurer, was not served with process, but is entering his appearance to the said cross

bill, but the same is not at issue as to time. No proof in the case has been taken as yet.

For a fuller account of all said pleadings and other proceedings in the case, reference is made to the original record.

II.

Complainants now further state that after the ruling by the court in respect to the injunction aforesaid, which had the effect of leaving complainants in the undisturbed possession of the unfinished buildings, they proceeded under the contract provisions to provide for work towards the completion of said buildings by open purchase or contract, and they let a contract to one John G. Unkefer, who at the time was engaged as a contractor constructing other buildings at the Mountain Branch, a true copy of which contract has
62 been filed in this cause, as exhibit to the answer to the cross bill of said Parrish, which is here referred to as embodied by recitation herein.

Complainants show that there has been expended under said last-named contract the sum of one hundred and four thousand six hundred and twenty-eight and 5-100 dollars ($104,628.05) in the work of remedying defective construction and bringing the hospital group to completion, as far as the same was practicable, in view of the condition of said buildings as left by said Parrish.

III.

Complainants therefore further state that the result of the operation aforesaid, occurring since the original bill was filed, has been demonstrated that it will be necessary for the protection and reimbursement of complainants that the surety of said Parrish on his construction contract bonds, the Union Surety & Guaranty Co., of Philadelphia, be made a defendant to this suit, so as that said surety may be a party to and bound by the accounting between the complainants and said Parrish, and held to answer under said bonds for the defaults of their said principal.

IV.

Complainants state that on November 19, 1901, defendant, Parrish, entered into a contract to construct complete the administration building, the kitchen building, two ward buildings, the corridors, and the fountain in the center of the court of said hospital group; that, on the same day, said Parrish and said The Union Surety & Guaranty Co. executed a bond to said home in the sum of $60,000.00 to answer for the full observance and performance of said construction contract.

Complainants further state that on March 8th, 1902, said Parrish entered into a contract to construct complete two additional ward buildings at said hospital group; and that on the same day, he and said The Union Surety & Guaranty Co. entered into a bond in the

sum of $30,000.00 to said National Home for Disabled Volunteer Soldiers to answer for the full observance and performance of said second contract.

Both of said contracts and bonds have been filed as Exhibit "A" to the answer of J. E. Parrish, and same are, by reference, made a part of this pleading.

The period of time for the completion of said contract was extended by and with the consent of the said surety, and all supplementary contracts of extension, etc., have been already filed as parts of this record, and are, by reference, made parts of this pleading.

V.

Complainants now further show that said contracts have been breached by defendant aforesaid:

63 (a) The time for the completion of the said group under said two contracts was extended from time to time, the last extension of both expiring August 15th, 1903. Defendant Parrish failed to complete the same within said extension periods, and the time was, by contract, stipulated, as well as in contemplation of law, made of the essence of the contracts aforesaid. As will be seen, the buildings were at said date very far from completion. The buildings were designed for use for a hospital for disabled soldiers of the Union, and defendants were aware at the time the contracts were entered into that the prompt completion of the same was essential to complainants.

On August 15, 1903, said Parrish was notified in writing that the complainants deemed and treated the said contracts breached and terminated for the failure to complete by said date.

(b) The contracts provided that in event the said Parrish should, "in the judgment of the architect in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the contract, then, in either case, the party of the first part (Moses Harris, general treasurer), or his successor legally appointed, shall have the power to annul this contract by giving notice in writing to that effect to the party of the second part." The architect duly certified that there was such failure on the part of said Parrish in respect of the two contracts, which certificates were in accordance with the facts, and on August 15, 1903, notices in writing were given to said Parrish by the general treasurer that the contracts were annulled; and complainants entered upon possession of the buildings.

(c) Said contracts provide that they nor any interest therein shall be transferred by the said J. E. Parrish to any other party, and that any such transfer shall cause the annulment of the contracts, so far as the National Home for Disabled Volunteer Soldiers is concerned. Complainants state and charge that said Parrish, prior to August 15, 1903, had, within the meaning of this provision, transferred said contracts, or an interest therein, and thereby annulled same.

VI.

These breaches involve the assessment of damages awardable to complainants and fixing of the bases of the liability of defendants on said bonds and accounting, in which are involved mutual accounts and demands, complicated in character, so that a further resort to equity, which already has jurisdiction, is necessary for such accounting, as well as to prevent a multiplicity of suits against the said surety on each of the two contracts and accompanying bonds, and remedy at law being inadequate.

64 Complainants are advised, state, and charge that for such work done by or for it since the annulment of said contracts on August 15, 1903, towards the completion of said hospital group, under the contracts, plans, and specifications, is chargeable against said defendants.

There have been so expended, under the contract with John G. Unkefer aforesaid, the following sums, to-wit:

On the main group (the portions of the hospital group covered by the first construction contract), the sum of $76,489.01, and on the two wards (covered by the last contract), the sum of $28,139.04, making an aggregated expenditure of $104,628.05. In addition to this architect's fees have been incurred by complainants by reason of said breach to the extent of $877.64, which complainants state and charge are distributable, on the basis of excess cost of the building above the contract prices, as follows: Main group, $802.98, and two wards, $74.66, same being on the basis of 2½% on such excess cost.

Complainants state and charge that, if not properly chargeable on said basis, yet that said sum of $877.64 is a fair and reasonable charge for the services of the architect, whose services on said work were rendered necessary by the breaches of the said contracts, which breaches occasion a delay in the completion of the buildings for several months beyond the period allowed to defendants by said contracts, respectively.

When said expenditures, made under the Unkefer contract and to the architect, are added to the amounts previously paid by said Parrish ($142,316.59) on main group, and ($67,860.47) for the two wards, the total expenditures aggregated as follows: Main group, $219,608.58, and the two wards, $96,074.17, or a grand total of $315,682.75.

If said Parrish were awarded a settlement on the basis of contract performance (which complainants are advised and charged to he is not, for reasons and on a ground hereinafter set out), then he would be entitled to credits against said last-named sums as follows: Main group, contract price, plus extras, $186,686.34; two wards, same, $93,013.00; or an aggregate sum of $279,699.34.

On such basis the excess cost to the complainants would appear to be as follows: Main group, $32,922.41; two wards, $3,061.17; or an aggregate sum of $35,983.41, credits and debits for extra work done

not chargeable to said Parrish, and for items of work omitted, specified to be done by the contracts, not being considered.

Complainants file herewith as Exhibit "A" (not to be copied in issuance of process) a schedule showing items of work done
65 on said hospital group that were not included in said contracts and specifications, which aggregate $2,959.25.

Complainants file herewith, as Exhibit "B" hereto (not to be copied, etc.), a schedule showing items of work called for in the contracts and specifications, as per contract provisions, and for which complainants show they are entitled to receive credit on settlement. In addition to these items, aggregating $3,084.50, is a further item of the same character already conceded by said Parrish in this cause, to wit, $649.00, for brickwork omitted in foundations (see Exhibit No. 1 to cross bill) making grand total of $3,733.59.

Thus, in event of accounting and settlement on a basis of contract performance, defendants are alleged to be indebted to complainants in a balance of thirty-six thousand seven hundred and fifty-seven and 75–100 dollars ($36,757.75) and interest.

VIII.

But complainants insist, state, and charge said contracts lack much of full performance at this date, by or in behalf of the defendants, in respect not mentioned above, being defects in the material furnished and work done by said Parrish prior to August 15th, 1903, that are not practicably susceptible to being remedied; and being defects for which complainants insist allowance should be made and recovery granted in their favor and against defendants. Among the same are the following:

1. The bricks used were not uniform in size, and many were crooked, cracked, and imperfect, and condemned as such.

2. They were laid uneven and with mortar joints not according to specifications, and varying in thickness from below specifications ¼ in. or ⅜ in. to above 1 in. Walls hollow in places.

3. Mortar defective, or bricks laid too dry, thus "deadening" it, materially affecting the strength and life of the building.

4. Settling of brickwork due to said causes, thus springing window sills and leaving window frames in bad condition.

5. Arches in corridors and porch out of radius, and depth uneven and not uniform, and piers of arches not plumb.

6. Stonework damaged, corners broken, edges marred, and excessive joints appearing therein. Not laid even.

7. The pine specified for use has not been used, but Bull, or North Caroline pine, and this of inferior grade, substituted.

8. Slate used that was not up to specifications as to color and unskillfully laid, and, in places, broken.

9. Window and door jambs out of plumb and square.

10. Bricks not properly laid in Flemish plumb bond, or even Flemish bond.

66 11. Windows constructed in disregard of the plans and specifications, and higher than called for in some, and lower than called for in others.

12. Cement mortar not used in chimneys.

13. Smokestack of kitchen building not laid in cement, and built straight, without battering.

14. Walls off plumb, and, in the administration building, so much as to require furring and lathing to overcome; this left plaster of even thickness and, on that account, defective, and cut down room space 4 inches in some rooms.

15. Rooms, halls, and doorways constructed off of axis and not located as called for.

16. Pilasters in hall not uniform.

17. Floor joints in ward building much out of level, requiring furring to even same, making floor less solid and durable.

18. Galvanized gutters not set to a true pitch.

19. Galvanized-iron vent cupolas are of iron below specifications.

20. Window sills improperly set and centers over top of frame set too low, allowing brick to rest on window frame, springing the centers, and window frames set out of plumb, and sills not far enough out to protect from weather.

21. Subfloors defective, of poor material, and weather swelled and shrunken.

22. Seapage drain tile not properly laid or protected or left continuous, and with no outlets.

23. Many anchors on floor joints and chases omitted.

24. Wooden window sills injured by not being protected during construction.

Complainants state and charge that for said defects in material and workmanship it is entitled to an allowance and recovery against defendants in the sum of twenty-five thousand do"ars ($25,000.00), in addition to the sum of thirty-six thousand seven hundred and fifty-seven and 75-100 dollars ($36,757.75) aforesaid.

IX.

Premises considered, the prayer of complainants is: That to the end that complainants may have that relief to which they are entitled in this court of equity, defendants, J. E. Parrish and the Union Surety & Guaranty Company, of Philadelphia, be subpœnaed by your honor's writ directed to them (the latter to be served by service upon Henry H. Ingersoll, of Knoxville, Tennessee, its agent duly designated for that purpose), commanding them to appear at the first rule day of this honorable court, and then and there true answer make (not under oath, which is waived), to all and singular the premises, and to further stand and abide by the orders and
67 decrees of the court; that all necessary orders and decrees be entered; that if advisable, an accounting be ordered by reference to ascertain the true demands, counter-claims and set-offs of the

contracting parties; that complainants be rewarded recoveries against defendants of the sums of $36,757.75 and $25,000.00, and interest, as indicated in the body of this bill; and they pray for general relief.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS,
By JOHN T. RICHARDS, *Assistant Inspector General.*

KIRKPATRICK, WILLIAMS & BOWMAN, *Solicitors.*

UNITED STATES OF AMERICA, NORTHEASTERN DIVISION,
Eastern District of Tennessee.

At the town of Johnson City, in the county of Washington, Tennessee, in the district aforesaid, this 27th day of February, 1904, personally appeared before me Thad A. Cox, U. S. commissioner of said district, Jno. T. Richards, and made oath that he is assistant inspector general of the National Home for Disabled Volunteer Soldiers and representative of the board of managers at the complainants' Mountain Branch in matters of supervising construction and establishment of said branch; that he is, of the complainants' officers and agents, the most conversant with the matters complained of in the foregoing bill of complaint; that the facts set forth therein, so far as they purport to be stated of knowledge, are true; and, so far as they purport to be stated on information and belief, he believes them to be true.

Given under my hand this, the 27th day of February, 1904.

THAD. A. COX, *U. S. Commissioner.*

Filed March 5, 1904.

J. T. CARTER, *Deputy Clerk.*

68 *Answer.*

In the Circuit Court of the United States, Northeastern Division of the Eastern District of Tennessee.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS AND Moses Harris, general treasurer of same, complainants,
vs.
J. E. PARRISH AND THE UNION SURETY & GUARANTY Company, defendants.
} In Equity.

Answer of J. E. Parrish to the amended and supplemented bill of the National Home for Disabled Volunteer Soldiers and Moses Harris, general treasurer, etc., against himself and another, filed March 5th, 1904.

Defendant J. E. Parrish, for answer to the amended and supplemental bill filed against himself and another in this cause, on the 5th day of March, 1904, says:

I.

It is true that complainants filed an original bill against defendant Parrish in this court on August 22nd, 1903, and that on August 31st,

1903, defendant filed an answer to said original bill; that on December 3rd, 1903, Parrish filed a cross bill against the National Home for Disabled Volunteer Soldiers and Moses Harris, general treasurer, etc.; that the National Home for Disabled Volunteer Soldiers filed an answer to the cross bill of Parrish on January 29th, 1904, but the pleadings themselves and the orders of the court best show what they contain and the steps taken, and the averments of the amended and supplemental bill in respect thereto, wherein they are different from the records, are denied.

It is true that the defendant protested against the taking of the work from him by complainants, resisting the course taken by the home authorities in reference thereto by every lawful method open to him, and at the very time it was taken away from him was upon the premises with a large force of laborers and mechanics, using every possible means to complete the work, and did not cease his efforts to do so until restrained by the orders of the court.

II.

It is not true, as stated in Paragraph II of the amended and supplemental bill, that complainants proceeded, under the contract provisions, to provide work toward the completion of said buildings by open purchase or contract or to complete the work in accordance with the provisions thereof. It is, however, true that they let
69 a contract to one Jno. G. Unkefer, or under some arrangement put him in charge of said work; but whether the copy made exhibit to the answer to the cross bill is a true copy of the agreement with him defendant does not know, and therefore denies that it is and calls for strict proof of same.

Defendant, on the best information obtainable, states that said Unkefer, under the terms of said agreement, whatever it was, was to be paid ten per cent (10%) of the cost of completing said work. And the work, after it was taken away from defendant by complainants and entrusted or placed in the hands of said Unkefer, was recklessly mismanaged and woefully neglected and corruptly and fraudulently manipulated so as to increase the cost of same, and the said home authorities and Unkefer are responsible therefor.

Defendant denies that there has been expended under said contract with Unkefer the sum of $104,628.05 in the work of remedying defective construction and bringing the hospital group to completion. This gross sum, sought to be charged against defendant in the form presented, furnishes no light or information to defendant of the items of said account, or of any of the matters which go to make up the sum sought to be recovered. It is not true that such sum was spent as stated, and said account is denied, whether presented in lump form or in an itemized statement. Defendant calls for a specific itemized statement of the different matters which complainants claim go to make up said sum of $104,628.05, and denies each and every item thereof, said statement to give the items of each

department of the work, as roofing, heating, and plumbing, and so on throughout the work of the entire hospital group, giving as to each department an itemized specific statement, making up the total of the material and labor claimed to be used therein. No such sum of $104,628.05 was necessary or could have been fairly or honestly spent in the completion of said work, and defendant here and now charges that said balance is not due or owing to complainants; that said sum is made up of corrupt and false charges. It is impossible for defendant to take up each item making up said total, because the items are not shown, but defendant was familiar with the conditions of the work when it was taken away from him by complainants, and he knows that no such sum was necessary to be expended in the purchase of material and the payment of labor in the completion of the work.

He charges that the complainants and Jno. G. Unkefer have mismanaged the work, fraudulently and corruptly inflated the items of expense, and said account of $104,628.05 is unjust, fraudulent, and corrupt, and that not one cent of it should be allowed complainants.

70 The bad faith of both Unkefer and complainants is shown by the fact that, in finishing that part of the work which defendant was prevented from completing, said Unkefer turned over almost every part and department of said work to parties who were doing the work for defendant when the work was taken away from him; the result is the work was retarded, the expenses increased, and large sums of money pretended to be spent on it, which was misappropriated, the labor debauched and degraded and rendered worthless, and the total cost of the work fraudulently and corruptly exaggerated and inflated, and is now sought to be saddled on defendant.

III.

It is denied that the result of complainants operation with the work in question has made it necessary for their protection and reimbursement to make the surety upon defendant's bond for construction a defendant in this suit.

Defendant owes nothing to complainants for which surety could or should be held liable. On the contrary, complainants are due to defendant a large sum of money, as stated and set forth in defendant's cross bill. It is denied that defendant is in fault upon said bond in regard to any matter which, by his contract with complainants, he was bound or obliged to do.

IV.

It is true that defendant did enter into the bonds for execution of the contracts of November 19th, 1901, and March 8th, 1902, but he denies that he is in default in the "observance and performance of

his contracts," or that said surety company is liable to complainants for anything on account thereof.

V.

It is not true, as stated in Paragraph V, that defendant's contracts with complainants have been breached by defendant.

(1) It is not true that time was of the essence of the contracts aforesaid, nor is it true that defendant Parrish failed within the time stated in his contracts, as made originally or as extended thereafter, to complete the work undertaken by him. As further answer to this allegation, defendant here refers to and adopts the allegation of his answer to the original bill and of his cross bill, as if incorporated and repeated herein. It is not true that said buildings were at the time the work was taken away from defendant very far from completion. The facts in regard to this have already been stated in his answer to the original bill and in his cross bill, and are here referred to and made a part hereof.

(2) It is not true that the architect duly certified that there was a failure on the part of the defendant to prosecute faithfully
71 and diligently the work in accordance with the specifications and requirements of the contract. The certificates of the architect, as required by the terms of the contract, were never made. Defendant denies the statement that they were so made. He denies that the steps necessary for the annulment of the contracts were taken, or that cause for annulment existed, and in respect to this matter he adopts the allegations of his answer to the original bill and of his cross bill, presenting valid defense hereto. He denies that the feature of the contract here referred to is correctly quoted.

He denies that Moses Harris, general treasurer, etc., had the right to annul said contracts. He denies that he took the steps necessary to do so. He denies that the National Home for Disabled Volunteer Soldiers had the right to do so, or took the steps necessary to do so. The action taken in respect to the alleged annulment was unauthorized, without authority, illegal, and void. The said contracts were not annulled. No cause for annulment existed.

(3) It is not true that defendant violated the terms of his contract with complainants by transferring an interest therein to another party. Never while defendant was prosecuting the work was any complaint made to this effect, nor after the work was taken away from defendant by complainants. The mention here made of it is made for the first time. No such transfer was made by defendant prior to August 15th, 1903, nor has any been made since that time. This matter was not offered or alleged as one of the grounds for the attempted annulment of the contracts. It is now too late to drag it up and adopt it as such. It is not true. But if it were true, complainant waived that question by attempting to declare the contract forfeited for other and entirely different reasons.

VI.

It is not true that defendant has breached his contracts with complainants. It is not true that he is liable to complainant for damages for breach of said contracts.

VII.

It is denied that defendant is liable for work done for complainants since August 15, 1903, towards the completion of the hospital group. He denies that the contracts were annulled. He denies that the work proceeded thereafter under the plans and specifications or under the contracts. Defendant denies that complainants are entitled to recover from him or to credit against him any sum alleged to have been spent by them on said hospital group since August 15, 1903.

It is not true that on the main group, covered by the first construction contract, there has been expended under the contract with Jno. G. Unkefer the sum of $76,489.01, and on the two wards, covered by the last contract, there has been expended the sum of $28,139.04.

72 It is not true that the architect's fees, in addition to said sums, have been incurred amounting to $877.64—on the main group $802.98 and on the two wards $76.66. It is not true that defendant is liable or properly chargeable with said separate sums or aggregate sums amounting to $104,628.05, or for said architect's fees, as claimed. It is denied that such services on the part of the architect were rendered necessary by breach of the contracts on the part of the defendant, or that sum charged for same is reasonable and fair. It is not true that defendant breached the contracts and the breaches of them caused delay and consequent retention of the architect and his force for several months, or for any time whatever. It is not true that the total expenditures aggregate on the main group $219,629.44 and on the two wards $96,082.35, or a grand total of $315,711.79. Nor is it true that the contract with J. E. Parrish for the main group, plus extras, amounts to only $186,685.34, the two wards $93,013.00, or an aggregate of $279,699.34. It is not true that the excess cost to complainants over the contract price and extras on the main group and the two wards amounted to $35,983.41, nor is it true that in addition to said last named sum should be increased by the amounts shown by Exhibit "A" claimed for items of work done on the hospital group that were not included in said contracts and specifications, aggregating $2,959.25. Nor should said sum be increased by the sum shown by Exhibit " B " for item of work called for in the contracts and specifications, which have not been or which have been done at less cost, on account of modifications of the specifications, amounting to $3,084.50. He denies each item of Exhibits "A" and " B." He does not owe them. They are not properly chargeable to him. They are unjust. It is not true that on basis of contract performance defendant is indebted to complainants in a

balance of $36,757.75 and interest. All the foregoing allegations of indebtedness are emphatically denied, and defendant will show by proof that complainants are indebted to him in the manner and for the reasons stated in his cross bill in the sum of $87,013.85, as there shown, and such damages in addition thereto as may be awardable to him by reason of the breaches of the contracts with him on the part of the complainants, which damages, he avers, should be in the sum of $75,000.00.

The contract price on the main group is $183,497.00 and the two wards $91,694.00. The extra labor and material up to the time the work was taken from him, for which defendant should be paid in addition thereto, amounts to $21,994.91. These amounts aggregate $297,185.91, instead of $279,699.34.

73 The items of extras here referred to are set forth in detail in exhibits to defendant's answer to the original bill and in his cross bill, and are here referred to and make a part of. The unreasonableness of the account presented by the amended and supplemental bill, amounting to $104,628.05 and $877.64, architect's fees, for the completion of the work, is here alleged and charged. The contract price for the whole work amounted to $275,191.00. The total extras up to the time work was taken from defendant, $21,994.91. The amount paid defendant upon the estimate of the architect was $210,172.00. The retained percentage was $27,732.00. The work done, on which there was no estimate by the architect, was $38,000.00 to $39,000.00. These items aggregate $277,820.00. The defendant states that at the time the work was taken away from him $20,000.00 should have completed it in every respect in accordance with the contract requirements and provisions. Instead of this, defendant is confronted with a claim for an account of $104,628.05 and $877.64 additional as architect's fees. If complainant's claim is just, honest, and correct, there has been expended on the work something more than the sum of $85,000.00 in excess of both of the contract price and the $21,991.00 claimed by defendant. Defendant denies that any such expenditure has been or should have been made on the work. The statement of the labor and material furnished for the group by defendant to the time the work was taken from him, as stated in his answer to the original bill, amounted to $277,820.00, as shown by Exhibit " No. 1 " to that answer. The facts shown by this Exhibit " No. 1 " are correct, and truly represent the account as to this matter. The wrong must therefore be in the account of the complainants. Defendant denies its correctness. He denies each and every article of the expenditure, whether for labor or material, or for the work of the architect, or for wages or salaries of foremen or bosses or superintendents, or for commission or per cent to Jno. G. Unkefer, or any matter whatsoever. He charges that said claim and any part thereof is unjust and fraudulent, and again denies that he owes the same.

VIII.

It is not true that said contracts lack much of full performance in every respect being defects in the material furnished, and the work done by said Parrish prior to August 15th, 1903, which cannot be remedied.

No defects can be shown to exist. This allegation is denied. It is not true that for said alleged defects complainants are entitled to $25,000.00 as damages.

And now referring to said defects in the order alleged, defendant says:

1. As to brick not uniform in size, crooked, cracked, and imperfect and condemned as such, the walls hollow in places. That the bricks were such as fully met all the conditions and require-
74 ments of the contracts, plans, and specifications, as well as the approval of the architect in charge of the work, and were laid in the wall as required by the plans and specifications. Defendant denies that the bricks lacked the uniformity in size required or that they were crooked, cracked, and imperfect or condemned. It is not true as to hollow walls.

2. The mortar joints were of size and the bricks laid as to evenness, as required by the specifications. The allegation as to this matter is denied.

3. He denies that the mortar was defective and the bricks laid too dry and that the strength and life of the building effected thereby.

4. It is not true that the setting of the brick work was due to said causes, thus springing window sills and leaving the window frames in bad condition. It is denied that the brick work has settled, as alleged.

5. It is not true that arches in porch and corridors are out of radius, and depth uneven and not plumb.

6. It is not true that the stone work is damaged, corners broken, edges marred, and excessive joints appearing therein, and that same was not even.

7. He denies that the pine specified to be used has not been used, but Bull or North Carolina pine substituted, and pine of inferior grade substituted.

8. He denies that the slate is broken, and calls for proof as to alleged defects therein.

9. It is not true that the window and door jambs are out of plumb and square.

10. It is not true that the bricks were not properly laid in Flemish plumb bond, or even Flemish bond. The bricks were laid as required.

11. It is not true that the windows were constructed in disregard of the plans and specifications, and higher than called for in some and lower than called for in other instances.

12. Cement mortar was used in chimneys where required, and statements to the contrary are denied.

13. The smokestack in the kitchen building was built as required, and laid in cement mortar, as required by the specifications. He denies the allegation to the contrary.

14. It is not true that the walls are out of plumb so much as to require furring to overcome in the administration building. The plaster was not left of unusual thickness on that account and defective, and the room space cut down 4 inches in some rooms.

15. He denies that the rooms, halls, and doorways were constructed off of the axis and not located as called for.

16. The pilasters in the hall are uniform, and the statement to the contrary is denied.

75 17. It is not true that the floor joists in the ward buildings are out of level, requiring furring to even same, making floor less solid and durable.

18. The galvanized gutters were not set to a true pitch, as stated. When the work was taken from the defendant they were in course of construction and not then ready to be passed upon and accepted as a completed job.

19. He denies that the iron vent cupolas are iron below specification.

20. He denies that the window sills are improperly set and centers over the top of same set too low, allowing the brick to rest on the window frames, springing the centers, and the window frames set out of plumb, and the sills not far enough to protect from the weather.

21. It is not true that the subfloors were defective, of poor material, weather swelled, and shrunken. This material and workmanship was as required.

22. He denies that the seapage drain tile was not properly laid or protected, or left continuous and with no outlet.

23. It is not true that many anchors on floor joist and shores were omitted.

24. It is not true that wooden window sills were injured by not being protected during construction.

All of which matters the defendant is ready to aver, maintain, and prove, as this honorable court shall direct, and hereby prays to be hence dismissed with all reasonable costs and charges in that behalf sustained.

J. E. PARRISH,
By Solicitor.

SHIELDS, CATES & MOUNTCASTLE,
and
HARR & BURROW,
Solicitors for Defendant.

Filed March 26, 1904.

J. T. CARTER, *Deputy Clerk.*

57448—12——5

EXHIBIT "A" TO DEPOSITION OF J. E. PARRISH, ON FILE.

Articles of agreement.

Articles of agreement entered into at New York, N. Y., this 19th day of November, nineteen hundred and one, by Moses Harris, general treasurer, National Home for D. V. S., on the first part, and J. E. Parrish, of Lynchburg, of the county of Campbell and State of Virginia, of the second part:

This agreement witnesseth, that in conformity with the advertisement and specifications hereunto attached, and which, so far
76 as they relate to this contract, form a part of it, the said Moses Harris, general treasurer National Home for D. V. S., for and in behalf of the National Home for D. V. S., and the said J. E. Parrish, for himself, his heirs, executors and administrators, have mutally agreed, and by these presents do mutually covenant and agree, to and with each other, as follows, viz: To furnish all materials, labor, etc., for the entire construction complete of the administration building, the kitchen building, the two (2) ward buildings, the corridor, and the fountain in the center of the court. The portions of the buildings mentioned under the heading alternate estimate, on page nine (9) of the specifications, to be of limestone, as therein specified. The drainage on the grounds to be omitted, but the water supply to the fountain to be included in the work done. The front walls of the two (2) ward buildings that are omitted to be completed to the height of the parapet of the corridor, with the masonry portion complete and capped with limestone, and the ends of the walls returning two (2) feet and toothed to receive the future work. Sash and doors to be placed in the openings. All exterior steps to be of limestone in single pieces. All of the above to be in accordance with the drawings on file in the office of the National Home for Disabled Volunteer Soldiers, for the sum of one hundred and eighty-three thousand four hundred and ninety-seven ($183,497) dollars.

If the amount of masonry in the foundation is greater or less than that shown on the drawings, the contract price will be increased or decreased, respectively, at the rate of twenty-five (25) cents per cubic foot for brick work, and twenty-two (22) cents per cubic foot for concrete.

For excavating and depositing material where the architect directs within a distance of 500 feet and doing necessary sheet piling and pumping for this work, for the sum of eighteen (18) cents per cubic yard.

For blasting and excavating rock and depositing where the architect directs within a distance of 500 feet, for the sum of seventy-five (75) cents per cubic yard.

For distributing, rolling, tamping, and otherwise settling and grading excavated material that has been deposited near the point of the work, for the sum of ten (10) cents per cubic yard.

For back filling and refilling trenches and tamping and settling the refilled earth, and carting earth for this purpose, if necessary, for the sum of ten (10) cents per cubic yard.

The time stipulated for the completion of the whole work is one year.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an
77 inspector appointed on the part of the National Home for D. V. S., and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the architect as to quality and upon all questions concerning plans, specifications, sizes, materials, or workmanship shall be final.

Any and all articles that may, upon inspection, be condemned or rejected shall be removed from the premises within ten days after the said J. E. Parrish, or his agent, shall have been notified of such rejection.

Each and every person employed by the contractor in providing materials or performing labor upon the said buildings, etc., shall be, in the opinion of the architect, a suitable, competent, and satisfactory person. The contractor shall at once remove from the work any person objected to by the architect.

All reasonable and proper facilities are to be given to the architect for the inspection of all work done and material furnished under this contract, whether at the home or elsewhere.

The said J. E. Parrish shall commence work on or before the first day of December, nineteen hundred and one (1901), and shall complete the said work on or before the 18th day of November, nineteen hundred and two (1902).

If in any event the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the architect in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor, legally appointed, shall have power to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the National Home for D. V. S., and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States; provided, however, that if the party (of parties) of the second part shall, by freshets, ice, or other force or violence of the elements, and by no other fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this

contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judg-
78 ment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

If at any time during the prosecution of the work it be found advantageous or necessary to make any changes or modifications in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modifications must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract: Provided, that no payment shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the National Home for D. V. S. by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract and not expressly bargained for and specifically included therein unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties.

The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material, and the party of the first part shall have the right to retain a sufficient sum to meet any liabilities incurred by the contractor on account of the work until satisfied that settlement has been made.

Payments shall be made to the said J. E. Parrish monthly when the work herein contracted for shall have been delivered and accepted, reserving ten per cent from each payment until the whole work shall have been so delivered and accepted.

Neither this contract nor any interest therein shall be transferred by the said J. E. Parrish to any other party, and any such transfer shall cause the annulment of the contract so far as the National Home for D. V. S. is concerned. All rights of action, however, to recover for any breach of this contract by the said J. E. Parrish are reserved to the National Home for D. V. S.

Erasure in lines 2 and 7 of the name "J. M. Berming-
79 ham," and inserting "Moses Harris" instead, done before signing.

In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS,
By MOSES HARRIS,
General Treasurer, National Home.

J. E. PARISH.

Witnesses:
HUGO SPENCER,
EDWARD P. LONG.

[SEAL.] The National Home for Disabled Volunteer Soldiers.

The Nation to Her Defenders. March 3, 1865.

4163 *Bond.*

Know all men by these presents, that we, J. E. Parrish, as principal, and the Union Surety & Guaranty Co., of Philadelphia, in the county of Philadelphia and State of Pennsylvania, and authorized to do business in the county of New York and State of New York, as surety, are held and bound unto the National Home for D. V. S. in the penal sum of sixty thousand dollars ($60,000), to the payment of which sum, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Given under our hands and seals this 19th day of November, nineteen hundred and one.

The condition of this obligation is such that whereas the above bounded J. E. Parrish has, on the 19th day of November, one thousand nine hundred and one, entered into a contract with the National Home for D. V. S. for furnishing and delivering supplies, as more particularly designated in the said contract hereto attached.

Now, therefore, if the above bounded J. E. Parrish, his heirs, executors, and administrators, shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by the same contract agreed and covenanted by themselves to be observed and performed and according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the National Home for D. V. S. as during the
80 original term of the same, then the above obligations shall be void and of no effect; otherwise to remain in full force and virtue.

Witnesses:
EDWARD P. LONG.

J. E. PARRISH. [SEAL.]
THE UNION SURETY & GUARANTY CO.,
EUGENE VANSHAICK, *Chairman.*

Attest:
L. L. MASON, *Secretary.* [SEAL.]

The Union Surety & Guaranty Company, incorporated 1899. [SEAL.]

Additional clauses.

It is agreed by and between the parties hereto, this 19th day of November, 1901:

That the specifications, plans, and drawings, each and every part of them, the advertisement, the proposal for bid or estimate and bid of estimate of the contractor are hereby made a part and parcel of this agreement.

That in order to facilitate the work the architect will from time to time make an approximate estimate, in writing, of the value of the work completed since the last progress payment, provided the amount of such approximate estimate be or exceed five thousand ($5,000) dollars; and the home will cause to be paid to the contractor ninety (90%) per cent of the amount of such estimates, provided that the parties of the first part may at all times reserve and retain out of said sum or sums such amounts as by the terms of this contract they are authorized to retain.

That the contractor will punctually pay the workmen who shall be employed on the aforesaid work in cash current, and not in what is denominated store-pay.

That the "contractor" shall assume all liability for the use of patented materials or processes, and shall pay all royalties and meet all claims for damages for infringement of patents, and shall defend, at his own cost, all suits brought to recover such royalties, damages, or penalties for infringement, and wherever in this specification or within the terms of this contract any patented material or work is specified or provided for, the cost of all such royalties, patented rights, etc., shall be considered as included in the contract price for the whole work.

That the contractor shall assume all liability for the loss of life or limb that may occur in connection with the work.

81 That the contractor will procure and deliver to the National Home insurance policies from companies approved by the National Home, and made in favor of the National Home for D. V. S., to cover all loss or damage to completed work upon which payments have or are to be made.

That if the "contractor" shall fail to fully and entirely complete the work as provided for in this agreement, in each and every part, within the time hereinbefore limited for such performance and completion, the said "contractor" shall and will pay to the said parties of the first part, in consideration of the damages sustained by the said parties of the first part on account of the noncompletion of the building and the consequent loss of its use, the sum of twenty-five dollars per day for each and every day after the expiration of the time limit of this contract during which the contract shall be incomplete and unfinished. And the said parties of the first part shall and may deduct the said sum of twenty-five dollars per day from the moneys that may be due or become due to the said "contractor" under this agreement.

That if, before the completion of the work contemplated herein, it shall become necessary to do any other work than is provided for in this contract, the said "contractor" will not in any way interfere with or molest such other person or persons as the said home may employ to do such work, and will suspend such part of the work herein specified, or will carry on the same in such a manner as may be ordered by the "architect" to afford all reasonable facilities for doing such work, and no other damage or claim by the said "contractor" therefore shall be allowed, except such extension of time specified in this contract for the performance thereof as the said "architect" may deem reasonable and shall so certify in writing.

In witness whereof, the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS,
By MOSES HARRIS,
General Treasurer, National Home for D. V. S.

(Seal.) The National Home for Disabled Volunteer Soldiers.
The Nation to Her Defenders. March 3, 1865.

J. E. PARRISH.

Witnesses:
HUGO SPENCER,
EDWARD P. LONG,

82 In the United States Circuit Court at Greeneville.

NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers, et al., *vs.* J. E. PARRISH. } No. 1336. In Equity.

Opinion on exception to report of R. H. Sansom, special master.

At a previous hearing in this case Judge Clark held that the contract between the complainant home and the defendant Parrish for the construction of the hospital group of buildings was lawfully terminated on account of the failure of Parrish to carry forward the work in a satisfactory manner and substantial and material delays and defects, which justified the home in treating the contract as breached and terminated, but that this termination should not be attended with any forfeiture against Parrish of reserved percentage due him or of any sum justly and legally due him in any way, and that Parrish was entitled to recover from the home the original contract price, with all legal extras added, less credits to the home for payments which had been made for work, and the sum reasonably required for the fair and economical completion of the buildings by the home after the termination of the contract, and with proper

allowances for any omissions, modifications, and changes that had been made in the contract reducing the cost of construction.

A reference was ordered to ascertain the amount thus due, with the further direction that, as the appellate court might take a different view as to the measure of recovery upon the "exceedingly close and difficult case," the master should also report the sum to which the defendant Parrish would be entitled on a *quantum meruit* basis when the contract was terminated and the home took possession of the buildings.

The special master, Judge D. L. Snodgrass, clerk of the court, reported that $50,000.00 was the amount that should be charged to Parrish as reasonably necessary to have been expended in good faith to complete the work, including the sum of $3,000.00 necessary for bringing prior defective work to a proper standard; that $761.50 was a proper allowance to the home for omissions, modifications, and changes in the plans and specifications reducing the cost of construction under the contract; that $17,753.00 was a proper allowance to Parrish for extras furnished by him not included under the original contract; and that $52,033.00 was the amount which should be allowed Parrish for balance due him on *quantum meruit* basis when
83 the contract was terminated and the home took possession; none of these items including interest, as to which the special master made no report.

This report of the special master having been set aside, with adjudication on the merits, on account of what Judge Clark held to be error in procedure in dealing with the accounts, a second reference was ordered.

In ordering this second reference Judge Clark stated in his opinion that when the home had been shown to have actually expended a certain sum of money in the completion of buildings for work and materials which actually went into buildings, such sums were to be taken as prima facie correct, and the burden was on Parrish to show that the sum thus charged and proven was not a proper, reasonable, and just charge against him; but that in view of the proof that some of the foremen and laborers doing work in different departments under Unkefer, in completing the contract, did not act in good faith and did not undertake the work diligently and as duty and honesty required, but undertook to make all they could out of the situation and wasted considerable time in idleness, laziness, and drunkenness, it would not be proper to charge Parrish any sums of money for which dishonest claims were made in this fashion, and the special master should make proper deductions in his allowances, so as to approximately cover any charge of this sort, leaving the contractor to pay for only such labor as was needed to do the work and not for false time put in by men engaged in drunkenness and idleness; and, further, that for the home to make out a prima facie case against Parrish in the matter of cost of completion, it was "necessary for the home to prove that the given expenditures was made for material or work, and that the material or work went into the home

building, and if there was a probability of it going into some other building on account of Unkefer's attitude the proof should be more cogent"; and that the case required not merely proof that any given bill for material had been paid for by the home, but proof by proper witnesses, however expensive, that the material was actually delivered and went into the home, and that "it is only when this is done that the prima facie case is made out by the home by the allowance of the expense."

Much additional proof having been taken under the second order of reference, the special master, Judge R. H. Sansom, reported that $46,570.74 was the sum reasonably necessary to have been expended in good faith, in the completion of the work (not including the bringing of prior work to standard); that $761.50 was a proper allowance to the home for omissions and changes in the plans and specifications reducing the cost of construction; that $3,000.00 was required to bring prior defective work to a proper standard;
84 that $19,773.92 was a proper allowance to Parrish for extras furnished; and that $52,206.70 should be allowed to Parrish for balance due him on a quantum meruit basis when the home took possession; none of these items including interest, as to which the special master made no report.

Comparing the reports of the two special masters, it will be seen that their reports as to the items of omissions and changes and bringing defective work to standard are the same, and that the second report allows the home $429.26 less than the first for cost of completion, and Parrish $2,020.92 more for extras and $163.70 more on a quantum meruit basis. The net result would be that, on the basis of recovery fixed by Judge Clark's decree, the second report allows Parrish $2,450.52 more than the first, and on a quantum meruit basis $163.70 more, all exclusive of interest.

Many exceptions have been filed by each side to the second master's report, which is now under consideration.

In acting upon these exceptions, the following well-settled rules are to be observed:

First. Exceptions to master's reports "are to be regarded so far only as they are supported by the special statements of the master or by evidence, which ought to be brought before the court by a reference to the particular testimony on which the exceptant relies. Were it otherwise, were the court to look into the immense mass of testimony laid before the commissioner, the reference to him would be of little avail." (Per Marshall, Chief Justice, in Harding vs. Handy, 11 Wheat., 103; Greene vs. Bishop, 1 Cliff., 186; Fed. Cas., 5, 673; Jeffrey vs. Brown (C. C.), 29 Fed., 476, 479; Jones vs. Lamar (C. C.), 145 Fed., 544, 557.) In the last-named case the court said: "The exceptions must be specific, pointing out the particular errors relied upon, and where they are based upon particular evidence contradicting conclusions of the master they should refer to the evidence in the record where the same may be found, and not leave the court to grope through voluminous records of testimony, as in this case.

running into thousands of pages, to find, as best it may, where the evidence relied on may be found."

Second. In dealing with exceptions to masters' reports, conclusions of the master depending upon conflicting testimony have every reasonable presumption in their favor and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part. (Tilghman vs. Proctor, 125 U. S., 136; Callaghan vs. Meyers, 128 U. S., 617; Kimberly vs. Arms, 129 U. S., 512; Crawford vs. Neal, 114 U. S., 585; Camden vs. Stewart, 144 U. S., 104; Furrer vs. Ferris, 145 U. S., 132; Davis vs. Schwartz, 155 U. S., 631; Lake Erie R. R. Co. vs. Fremont (C. C. A., 6 C.), 92 Fed., 85 721, 735; Columbus R. R. Co., Appeals (C. C. A., 6 C.), 109 Fed., 177, 219; Central Trust Co. vs. East Tenn. Land Co. (C. C. Tenn.), 79 Fed., 19; Fordyce vs. Railroad Co. (C. C.), 145 Fed., 544, 557.)

* * * * * * *

Complainant's thirteenth exception in reference to the master's statements and his opinion in reference to interest is overruled on the ground that the master did not report on the question of interest, which was not included in the order of reference.

* * * * * * *

The defendant's seventeenth exception relates to the matter of interest to be allowed the defendant, Parrish. This has likewise been considered under the complainant's exception relating to the same matter, and this subject not being embraced within the terms of the reference to the master, the defendant's exception in reference to this item is likewise overruled. * * * All questions of interest, costs, and all other questions arising as to the proper decree upon the master's report as thus confirmed are reserved until a further hearing.

SANFORD, *Judge.*

SEPTEMBER 16, 1910.

Memorandum opinion as to final decree.

2. As to the question of interest, I have had great doubt. Interest is not to be awarded on a claim against a sovereign Government unless its consent to pay interest has been manifested by an act of its legislature or by a lawful contract of its executive officers. (Angarica vs. Bayard, 127 U. S., 251, 260; United States vs. North Carolina, 136 U. S., 211, 216.) And it is expressly provided that the Court of Claims shall not allow interest upon any claim against the Government unless upon a contract expressly stipulating therefor. (R. S., 1091; Tillson vs. United States, 100 U. S., 43; Harvey vs. United States, 113 U. S., 243.) And this inhibition, it has been held, likewise applies in suits to enforce claims against the Government brought in other Federal courts under the act of March 3, 1887, or other special acts not authorizing a recovery of interest. (Baxter vs. United States

(C. C. A., 8 C.), 51 Fed., 671; United States vs. Barker (C. C. A., 5 C.), 74 Fed., 483; Watts vs. United States (D. C.), 129 Fed., 222.)

It has, however, on the other hand, been repeatedly held by the Supreme Court that in a suit brought against a collector of customs to recover taxes illegally collected, interest, in a proper case, may be allowed in the discretion of the court. (Urskine vs. Van Arsdale, 15 Wall., 75; Redfield vs. Iron Co., 110 U. S., 174; Redfield vs. Bartels, 139 U. S., 694.)

86 Without determining to what extent, if any, the opinion in Redfield vs. Bartels overrules or modifies the general principle stated in United States vs. North Carolina, supra, as applied to a direct claim against the Government, I am of the opinion that, in any event, the general doctrine stated in the North Carolina case does not apply so as to prevent the allowance of interest on a claim which is not directly against the Government but against a corporation, such as the national home, which, although a governmental agency, is sued on a claim growing out of matters directly within the scope of its corporate authority.

After careful consideration I held, in Lyle vs. National Home (C. C.), 170 Fed., 842), that a national home, being a charitable institution engaged as an agency of the Federal Government in the discharge of a governmental function, is not subject to suit in an action sounding in tort the power to "sue and be sued in courts of law and equity" conferred on the corporation by Rev. St. 4825, being limited to matters within the scope of the other corporate powers with which it is vested. One of these specific powers is, however, that of procuring sites and having necessary buildings erected. Rev. St., 4830. However, as this necessarily implies the power to contract for the erection of the buildings, a suit against a national home arising out of a contract for the erection of its buildings is clearly not within the rule laid down in the Lyle case. And the national home being, in my opinion, subject to suit, although a Government agency in reference to its contract for the erection of buildings, I see no reason why such suit should not be conducted upon general principles of law and interest allowed against it in matters growing out of such contract where interest would be equitably allowed against a private individual. In the present case the home contracted for the buildings, and agreed to pay Parrish the amounts due in monthly instalments, reserving 10% until delivery and acceptance, and had in its hands at the time of annulment reserved percentages on its own estimate of work previously done aggregating $23,353.00, or more than the principal sum now found to be due Parrish on the basis of the accounting. It obtained possession of the buildings shortly after annulment, and the buildings were completed, as reported by the master and agreed by counsel at bar, on or before February 15, 1904, since which time it has been in complete possession of the property, using and enjoying the same for its charitable purposes.

On the whole, I conclude that as this suit is not against the Government directly, the strict rule of law forbidding the allowance of

interest is not applicable, but that as it is a suit against a
87 national home as a governmental agency, in reference to a matter as to which it is specifically authorized to contract, interest may be allowed against it as against any other litigant upon equitable terms. I accordingly find that the decree in favor of the cross complainant should bear interest from February 15, 1904, the date of completion of the buildings. In reaching this conclusion I have resolved the doubt as to the legal question involved in favor of what appears to me to be clearly the equities of the case, it being, in my judgment, manifestly inequitable that the home should have had the use and possession of the property during all these years, retaining in its hands the balance due to the cross complainant, and should not be chargeable with interest thereon. And even this result, it will be seen, will result in an aggregate decree for less than the reasonable value of the property which it obtained at the annulment, as otherwise fixed on a *quantum meruit* basis.

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SANFORD, *Judge.*

OCTOBER 6, 1910.

Decree.

NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers et al., *vs.* J. E. PARRISH ET AL. | No. 1336. In Equity. At Greeneville.

Bill and cross bill.

This cause came on to be finally heard before the Honorable Edward T. Sanford, United States district judge, sitting as a circuit judge in equity for the northeastern division of the eastern district of Tennessee, upon the entire record in the above case and especially upon the report of the special master, R. H. Sansom, made herein, and exceptions thereto filed by complainant and defendant, and upon argument and briefs of counsel, from all of which it is ordered, adjudged, and decreed by the court, as follows:

First. As to complainant's exceptions with respect to the reasonable cost of completion of said hospital group of buildings:

Edge-grain, yellow-pine flooring, master's report modified so as to add to cost of completion	$246.44
Mill work, maple flooring, modified so as to add to cost of completion	539.61
Mill work, Adams-Monroe Mfg. Co., modified so as to add to cost of completion	2,500.00
Heating, plumbing, and electrical material, modified so as to add	1,986.31
Roman brick, modified so as to add	217.60
88 Tiling, modified so as to add	181.60
Roman mosaic, modified so as to add	130.36
Slate slabs, modified so as to add	60.00
Mantels, modified so as to add	43.65
Elevators, modified so as to add	1,675.00
Labor, carpenter work, modified so as to add	1,500.00

Labor, painting department, modified so as to add	$705.36
Tile for kitchen refrigerator, modified so as to add	80.30
Plumbing for refrigerator, modified so as to add	51.14
Quadrants, springs, etc., modified so as to add	546.82
Timbering water line, etc., modified so as to add	16.04
Lumber from Johnson City Coal & Lumber Co., modified so as to add	414.50
Contractor's commission, modified so as to add	1,084.46
Total amount to be added to cost of completion by virtue of exceptions of complainant sustained	11,171.43
Making total cost of completion, according to the report of the master, as modified herein by exceptions allowed, the sum of	57,742.17

Second. With respect to the exception of complainant in regard to omissions, modifications, and changes in said contract, said exceptions are sustained so as to add the following amounts to the following items:

Coal bin	$20.00
Oil painting	453.14
Painting imitation marble	150.00
Calcemining	256.00
Sinks in kitchen	62.75
Pipe covering	9.00
Two electric lights in each ward	50.00
Trim in kitchen building	12.00
Two white coats plaster in building	184.20
Two steel plates	28.00
Waterproofing	69.20
Lining wainscoating to imitate tile	248.44
Coal hoist	65.00
Painting boxes	14.50
Total	1,622.23
Which, added to the amount fixed as reported by the master for omissions, modifications, and changes, to wit	761.50
Makes a total for said items of	2,383.73

Third. With respect to the exceptions of complainant in regard to extras, the fifteenth exception thereof, as to earth excavation, is sustained so as to disallow said extra as allowed by the master to the sum of $1,783.50.

89 Fourth. With respect to the exceptions of complainant on the report of the master on quantum meruit, the following subtractions and deductions are made with respect to the following items and amounts:

Heating and plumbing	$1,852.80
Mill work	2,250.25
Additional mill work	204.80
Elevator	1,375.00
Furniture for Richards' residence	38.50
Additional brickwork	200.00
Brick mason work for Richards	15.00
Total	5,936.35

Making the amount of quantum meruit, according to the exceptions herein sustained, the sum of $52,206.70, less the sum of $5,936.35, or the sum of $46,270.35.

All the other exceptions of the complainant are overruled, except as to exception on question of cost, not submitted to the master.

As to defendant's exceptions, the same are sustained so far as:

(1) To disallow as additional architect's fees	$809.40
(2) To add as an extra the cost of change from canvass to wood roofing	1,317.90
(3) For clerical error as to additional quantity of concrete footing	23.76
(4) For extra refrigerator door and frame	7.00
(5) For clerical error in excavation	14.94
Making the total of additional allowance as extra	1,363.60

All other exceptions on the part of defendant are by the court overruled and disallowed, and since the sustaining of exceptions of complainant deducted from the extras allowed by the master amount to the sum of $1,783.50, and the sustaining of exceptions of defendant added to the extras found by the master, the sum of $1,363.60, the net result of said rulings is to deduct from the total of extras found by the master the sum of $419.90, which leaves the proper amount of extras as fixed by the court the sum of $19,773.92, as found by the master, less the sum disallowed of $419.90, or the sum of $19,354.02.

And, except as herein modified, it is decreed by the court that the report of the special master be in all respects confirmed, except as to the adjudication as to costs, and complainant's exception as to the master's action as to cost is sustained by the court upon the ground that the matter of cost is not embraced in the reference to the master, but a matter to be determined by the court on the coming in of the decree. And it appearing to the court that the amount due defendant J. E. Parrish, according to the first contract completed according to the plans and specifications, would be the sum of $183,497.00, and that the sum due defendant J. E. Parrish on the second contract, if completed according to the plans and specifications, would be the sum of $91,694.00, and that there would be due him under the amount of extras herein allowed the sum of $19,354.02, making a total of $294,545.02; and it further appearing to the court that there has been paid on said construction to defendant Parrish by complainant the sum of $210,177.06; that there were omissions, modifications, and changes from the specifications of said building as herein decreed the sum of $2,383.73; that, as found by the master and confirmed by the court, there is due a sum necessary to repay defects in construction to the amount of $3,000.00, and that a fair and reasonable sum necessary to the completion of said buildings after said contract was forfeited by the complainant is the sum of $57,742.17, making a total of $273,302.96, leaving due in favor of said defendant, without interest, the sum of $21,242.06. It is therefore ordered, adjudged, and decreed by the court that the defendant, J. E. Parrish, under his cross bill, have and recover of complainant in the original bill, the National Home for Disabled Volunteer Soldiers, the principal sum of $21,242.06, together with interest thereon from February 15th, 1904, the date when said home went into complete possession of said property, using and enjoying the same for its purposes, the said interest, to October 15th, 1910, amounting to the sum of $8,496.82, which,

added to the principal sum, aggregates the sum of $29,738.88, for which recovery is here had and for which execution is awarded.

It is also ordered, adjudged, and decreed by the court that said National Home for Disabled Volunteer Soldiers is not entitled to the additional credit of $3,597.91 claimed by it on account of the alleged payment of defendant Parrish's debt to the Farrel Company, for the reason stated by the court in the written opinion herewith filed.

It is also decreed by the court that the defendant, J. E. Parrish, have and recover of the complainant, National Home for Disabled Volunteer Soldiers, one-fourth of all the taxable costs of said cause, bill, and cross bill, which were incurred before the first order of reference, including the compensation of special master herein allowed; and in making up said bill of costs the clerk will look to the depositions and other testimony on file and will credit to the defendant, Parrish, all the taxable costs under the record which he has exhibited and shown to have been paid by him. The compensation of D. L. Snodgrass, special master, for services rendered by him in
91 this case is by the court fixed at the sum of $750.00; the compensation of R. H. Sansom, special master, for services rendered herein is hereby fixed at the sum of $1,500.00.

It is further ordered and decreed that the National Home for Disabled Volunteer Soldiers have and recover of the defendant, J. E. Parrish, three-fourths of all the taxable costs incurred before the first order of reference to the matter and one-fourth of the remaining costs of said cause.

The written opinions of the presiding judge filed herein with respect to the matters herein adjudicated are herewith made a part of the record in the cause and of this decree.

On motion of Harr & Burrow, and Shields, Cates & Mountcastle, a lien is granted by the court upon the decree herein rendered in favor of said J. E. Parrish for their reasonable fees as attorneys and solicitors for said J. E. Parrish, which may be due in this case.

Filed October 8, 1910.

H. L. MILLIGAN, *Deputy Clerk.*

In the Circuit Court of the United States, Eastern District of Tennessee, Northeastern Division.

N. H. D. V. S.,
vs.
J. E. PARRISH. } No. 1336.

Decree on petition to rehear on the part of complainant and defendant.

This case came on to be finally heard before the Hororable E. T. Sanford, United States district judge, sitting as circuit judge in equity for the northeastern division of the eastern district of Tennessee, upon the entire record, and especially upon the petition to

rehear and reply thereto filed by complainant, and petition to rehear and reply thereto filed by defendant, from which it is ordered, adjudged, and decreed by the court as follows:

First, as to complainant's exceptions, the following are sustained:

Exception No. 1. Edge grain pipe flooring, so as to allow in favor of complainant three items amounting to $40.00, leveling veranda floors, $157.50; relaying floors at entrance of corridors, $14.00; making a total of $211.50.

Exception No. 6. Labor in carpenter work, $504.01.

Exception No. 7. Labor in painting department, $175.00.

Exception No. 10. Insurance, $144.00.

Exception No. 10. Labor puttying basement wall, $200.00, making the total of exceptions in favor of complainant $1,234.51.

92 All the other exceptions of complainant are hereby disallowed.

Of defendant's exceptions, the following are sustained:

Exception No. 1, as to millwork, maple flooring, so as to allow defendant Parrish $22.14.

Exception No. 4. Roman brick, so as to allow $75.00.

Exception No. 8. Plumbing for refrigerator, ward building, so as to allow defendant $51.14.

Exception No. 11. Oil paintings, so as to allow defendant Parrish $453.14.

Exception No. 12. Painting in imitation of marble, so as to allow defendant $150.00.

Exception No. 13. Calcimining, so as to allow $256.00.

Exception No. 14. Sinks in kitchen, so as to allow $62.50.

Exception No. 15. Pipe covering, so as to allow $9.00.

Exception No. 16. Two electric lights in each ward, $50.00.

Exception No. 17. Trim in kitchen building, $12.00.

Making a total of $1,140.92.

These being in this decree placed as allowances in favor of Parrish on petition to rehear, though many of the items are, in fact, disallowances of previous allowances in favor of the home.

All other exceptions of defendant are hereby overruled.

The difference between the allowance in favor of Parrish under said petition to rehear, $1,140.92, and the amount allowed to complainant on its petition to rehear, $1,234.51, is the sum of $93.59, and inasmuch as the contractor is entitled to 10% commission under the exception of complainant sustained, there should be added to said amount of $93.59 in favor of complainant the further sum of $9.38, making a total net result to the complainant, by virtue of the petitions to rehear herein, the sum of $102.94.

It is therefore ordered, adjudged, and decreed by the court that, with respect to the former decree herein entered, in favor of the defendant Parrish against the complainant, to-wit: The sum of $29,738.88, the said sum of $102.94 be deducted, leaving as the amount of recovery herein in favor of defendant Parrish the sum of $29,635.94. In all other respects the decree originally entered

will stand as the final decree herein as of date of said original decree.

Filed January 6, 1911.

H. L. MILLIGAN, *Deputy Clerk.*

93 United States Circuit Court for the Northeastern Division of the Eastern District of Tennessee.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS ET AL.
vs.
J. E. PARRISH.

Bill and cross bill in equity.

Comes the complainant, the National Home for Disabled Volunteer Soldiers, and Moses Harris, general treasurer thereof, and file the following assignment of errors upon which they will rely upon their prosecution of appeal from the decree made by this honorable court on the 15th day of October, 1910, and the decree of this honorable court upon petitions to rehear said cause and decree (filed by the complainants and defendant), entered on the 6th day of January, 1911, in the above-entitled cause.

Assignment of errors.

I.

That the honorable Circuit Court aforesaid erred in said decrees in respect of and in the allowance of interest against appellants, said complainants, both and either of them, on the balance found due or payable under the construction contracts entered into by them with defendant, Parrish, for the construction of the hospiital group on the Mountain Branch reservation of the National Homæ for Disabled Volunteer Soldiers.

II.

Said court erred in not sustaining the contention of appellants that said contracts being with complainant, National Homæ for Disabled Volunteer Soldiers, a body corporate under the laws of the United States, created by the United States of America as an arm of the Government in the administration of a charity, and with appellant, Moses Harris, general treasurer, as an officer of thæ Government, interest should not be awarded against it, him, or thæm, it not appearing from any act of Congress or by said construction contracts or any lawful contract that consent or agreement to pay interest is manifested: U. S. vs. North Carolina (136 U. S., 211); U. S. vs. Bayard (127 U. S., 251); Wightman vs. U. S. (23 Ct. Cl., 144); Carr vs. State (11 L. R. A., 376); Houston vs. State (42 L. R. A., 49); Tilson vs. U. S. (100 U. S., 43); Harvey vs. U. S. (113 U. S.,

243); Ohio vs. Thomas (173 U. S., 276); Overholser vs. National Home for D. V. S. (62 L. R. A., 936).

Wherefore, the said complainants, as plaintiffs in error, in
94 order that the foregoing assignment of errors may be and appear of record, present the same to the court, and pray that such disposition be made thereof as is in accordance with law and the statutes in such cases made and provided, and complainants pray for a reversal of said decrees aforesaid.

S. C. WILLIAMS,
Solicitor for Complainants.

Filed April 11, 1911.

H. L. MILLIGAN, *Deputy Clerk.*

Petition for appeal and order on same.

United States Circuit Court for the Northeastern Division of the Eastern District of Tennessee.

NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers et al. *vs.* J. E. PARRISH.	Bill and cross bill in equity.

PETITION FOR APPEAL.

To the Hon. Edward T. Sanford, judge, etc.:

The complainants in the above-entitled cause, the National Home for Disabled Volunteer Soldiers, and Moses Harris, general treasurer thereof, conceiving themselves aggrieved by the decree entered in said cause on October 15, 1910, and January 6, 1911, wherein and whereby, among other things, it was adjudged that complainant, National Home for Disabled Volunteer Soldiers, should, under the cross bill, pay interest accrued from February ——, 1904, to the date of decree, on the construction contracts involved in this cause, do hereby appeal to the United States Circuit Court of Appeals for the Sixth Circuit, at Cincinnati, Ohio, from said decrees, both and either, and particularly from that part thereof which so adjudicates, in respect of interest being awarded on said contracts against complainants as cross defendants, both or either, for the reasons set forth in assignment of errors, which is filed herewith, and made by reference a part hereof, as copied in extenso; and they pray that this, their petition for appeal, be allowed and that a transcript of the pertinent record and proceedings upon which said decrees were based, duly authenticated, may be sent to the United States Court of Appeals, at Cincinnati, Ohio.

This April 3, 1911.

S. C. WILLIAMS,
Solicitor for Complainant.

ORDER.

The foregoing petition, accompanied by assignment of errors, having been presented to me, on consideration, the prayer for appeal is

allowed; and the bond for appeal is fixed at the sum of one
95 thousand dollars, upon the filing of which a certified transcript of the record and proceedings herein shall be forthwith transmitted to said United States Court of Appeals for the Sixth Circuit.

EDWARD T. SANFORD, *Judge.*

This April 8th, 1911.
Entered Jour. No. 1, Pg. 467.
Filed April 10, 1911.

H. L. MILLIGAN, *Deputy Clerk.*

Bond of appeal.

United States Court of Appeals, Sixth District, Pending in United States Circuit Court for the Northeast Division of the Eastern District of Tennessee.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS et al.
vs.
J. E. PARRISH.
} Bill and cross bill in equity.

Know all men by these presents, that we, the National Home for Disabled Volunteer Soldiers, a body corporate, and Moses Harris, general treasurer, principals, and Samuel C. Williams, of Johnson City, Washington County, Tennessee, as surety, are held and firmly bound to J. E. Parrish, defendant, etc., in the above-entitled cause in the penal sum of one thousand dollars ($1,000.00), to be paid to said Parrish, for the payment of which well and truly to be made we are jointly and severally bound, and the successors of said principals, and the heirs, executors, and administrators of said surety, firmly by these presents.

Sealed and dated the 3rd day of April, 1911.

Whereas the above-named principals have prosecuted an appeal to the United States Circuit Court of Apeals for the Sixth Circuit, at Cincinnati, Ohio; now, therefore, the condition of the above obligation is such that if the above-named principals shall prosecute said appeals from decrees herein with effect and answer all damages and costs, if it shall fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS,
By S. C. WILLIAMS, *Solicitor.*
MOSES HARRIS, *General Treasurer.*
By S. C. WILLIAMS, *Solicitor.*
By S. C. WILLIAMS, *Surety.*

Approved:

EDWARD T. SANFORD, *Judge, etc.*

Filed April 10, 1911.

H. L. MILLIGAN, *Deputy Clerk.*

96 *Directions as to appeal from Department of Justice.*

United States Circuit Court for the Northeastern Division of the Eastern District of Tennessee.

National Home for Disabled Volunteer Soldiers et al. *vs.* J. E. Parrish.	In equity.

To the Honorable Judge and Clerk of said Court:

The complainants in the above-entitled cause, the National Home for Disabled Volunteer Soldiers, and Moses Harris, general treasurer thereof, having submitted the question to the Department of Justice, whether an appeal should be prayed and prosecuted from the decrees rendered herein, they have been advised and directed to prosecute such an appeal on assignment of error to the effect that interest was erroneously allowed by the honorable Circuit Court on the construction contracts.

This certificate to that effect issues an authority for the prosecution of such appeal without formality of bond.

This April 10, 1911.

Geo. W. Wickersham,
Attorney General of U. S. A.

Filed April 11, 1911.

H. L. Milligan, *Deputy Clerk.*

Citation.

United States Court of Appeals, Sixth Circuit, pending in United States Circuit Court for Northeastern Division of Eastern District of Tennessee.

National Home for Disabled Volunteer Soldiers et al. *vs.* J. E. Parrish.	Bill and cross bill in equity.

United States of America, *ss:*

To J. E. Parrish, defendant and cross complainant:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Sixth Circuit, at Cincinnati, Ohio, to be held at said city of Cincinnati, in the State of Ohio, on the 8th day of May, 1911, pursuant to an order allowing an appeal filed and entered in the clerk's office of the Circuit Court of the United States for the Northeastern Division of the Eastern District of Tennessee, from a final decree or decrees, filed, signed
97 and entered on the 15th day of October, 1910, and the 6th day

of January, 1911, in that certain suit, being in equity, No. 1336, wherein the National Home for Disabled Volunteer Soldiers and Moses Harris, general treasurer, are complainants and appellants, and you are appellee and defendant, to show cause, if any there be, why the decrees rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, this the 8th day of April, A. D. 1911.

EDWARD T. SANFORD,
U. S. District Judge holding the U. S. Circuit Court.

Received copy and acknowledged service of the within citation this 12th day of April, 1911.

SHIELDS, CATES & MOUNTCASTLE,
Solicitors for defendant and appellee, J. E. Parrish.

Filed April 10, 1911.

H. L. MILLIGAN, *Deputy Clerk.*

Order extending time in which to prepare and file transcript.

United States Court of Appeals, Sixth Circuit, from United States Circuit Court for Eastern District of Tennessee.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS ET AL. *vs.* J. E. PARRISH.

In this cause, on cause shown, the time for printing the record on appeal and the filing of the record and docketing the same is hereby enlarged from return day May 8, 1911, to June 8, 1911.

Entered May 1, 1911.

SANFORD, *Judge.*

Entered Jour. No. 1, Pg. 468.
Filed May 2, 1911.

H. L. MILLIGAN, *Deputy Clerk.*

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF TENNESSEE,
Northeastern Division, ss:

I, D. L. Snodgrass, clerk of the United States Circuit Court, in and for the Eastern District of Tennessee, do hereby certify that the printing and writing is a true, full, correct, and complete copy
98 of the original record on file and remaining of record in my office in the matter of National Home for Disabled Volunteer Soldiers vs. J. E. Parrish.

In testimony whereof I hereunto set my hand and seal of the said Circuit Court at Greenville, Tennessee, this —— day of —— A. D., 19—.

D. L. SNODGRASS, *Clerk.*
By ——— ———, *Deputy Clerk.*

99 And afterwards, to wit, on June 3, 1911, præcipe for appearance of counsel was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS ET. AL.
vs.
J. E. PARRISH, FRANK LOVELAND. } # 2186.

Clerk of said court:

Please enter my appearance as counsel for the complainant and appellant, the National Home for Disabled Vol. Soldiers.

SAM'L C. WILLIAMS.

And afterwards, to wit, on September 18, 1911, a motion to advance the case was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS ET. AL.
vs.
J. E. PARRISH. } No. 2186.

100 Application of appellee, J. E. Parrish, to advance the cause for hearing, said application being joined in by appellant.

Your petitioner would respectfully show unto your honor that the above is a suit wherein judgment was rendered on January 6, 1911, in the court below, in favor of J. E. Parrish against appellant for the sum of $29,635.94; that of this sum $21,139.12 represents the principal found due appellant from appellee, and that the remainder of said decree represents the sum of $8,496.82 as interest allowed thereon; that the appeal in this case is only with respect to the interest, there being no further controversy in this case with respect to the principal sum; that appellee had demanded this sum of appellant, but appellant, the National Home for Disabled Volunteer Soldiers, has represented to appellant petitioner that the funds were not in hand for its payment and that application must be made in due course by the board of governors of appellant to the proper committees in Congress for an appropriation to cover the same,

101 and that said board of governors are unwilling to make application to Congress for an appropriation in piecemeal for the payment of this obligation, and that they will not make any application to Congress for an appropriation to cover the amount of this decree until the question of interest is determined, so that the final, fixed, and definite sum due may be applied for at the hands of Congress in an appropriation. For that reason both appellant and appellee are desirous that this case may be determined at as early a date as possible in order that the entire sum may be known and in order that they may make their application to the proper com-

mittees in Congress for an appropriation. And as some time is necessarily consumed in these preparations to submit these matters to Congress, it is desired that the same in all respects may be in hand, ready for action as soon as Congress should meet in December.

For which reason, in order that the matter may be speedily determined and whatever indebtedness may be due as speedily settled and adjusted as possible, your petitioner asks that this case
102 may be advanced for hearing, to the end that the case may be decided at as early a date as possible for the reasons hereinbefore stated.

SHIELDS, CATES & MOUNTCASTLE,
Solicitors for petitioner.

STATE OF TENNESSEE, *Knox County:*

Personally appeared before me the undersigned authority, R. E. L. Mountcastle, of counsel for petitioner, who makes oath that the facts stated herein are true to the best of his knowledge and belief.

[SEAL.] R. E. L. MOUNTCASTLE.

Sworn to and subscribed before me this 6th day of September, 1911.

W. K. ANDERSON, *Notary Public.*

Counsel for appellant, National Home for Disabled Volunteer Soldiers, joins in the above application for the advance of this case for hearing for the reasons stated in said petition.

S. C. WILLIAMS, *Sol. for N. H. D. V. S.*

And afterwards, to wit, on October 3, 1911, said motion was submitted to the court as follows:

103 United States Circuit Court of Appeals for the Sixth Circuit.

NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers et al. *vs.* J. E. PARRISH.	#2186. Before Warrington, Knappen, and Denison, J. J.

Motion to advance cause is submitted.

And afterwards, to wit, on October 12, 1911, an order was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS ET AL.
vs. #2186.
J. E. PARRISH.

Motion to advance this cause for hearing is hereby denied.

And afterwards, to wit, on March 11, 1912, an order was entered in said cause clothed in the words and figures as follows:

104 United States Circuit Court of Appeals for the Sixth Circuit.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS ET AL.
vs. #2186.
J. E. PARRISH.

This cause is argued by Mr. Samuel C. Williams for the appellants and is submitted on briefs of counsel for the appellee, without oral argument.

And afterwards, to wit, on April 2, 1912, a decree was entered in said cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS ET AL.
vs. #2186.
J. E. PARRISH.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern
105 District of Tennessee and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed without costs of this court.

And on the same day, to wit, April 2, 1912, an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

106 Filed Apr. 2, 1912. Frank O. Loveland, clerk.

No. 2186.

United States Circuit Court of Appeals, Sixth Circuit.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS ET AL., appellants,
vs.
J. E. PARRISH, appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Submitted March 11, 1912.
Decided April 2, 1912.
Before Warrington, Knappen, and Denison, Circuit Judges.

Knappen, Circuit Judge:

The National Home for Disabled Volunteer Soldiers is incorporated under congressional act of March 21, 1866, and the acts amendatory thereto (Rev. Stat., Sec. 4825). By act of January 28, 1901 (31 St. L., Chap. 184, p. 745), the board of managers of the home was authorized to purchase grounds and erect buildings for what is now called the Mountain Branch of the home, near Johnson City, Tennessee, an appropriation being made for the purpose. On November 19, 1901, the home, through its general treasurer, contracted with the appellee for the construction of a group of buildings for this Mountain Branch of the home. After the construction was partly
107 performed the home annulled the contract for failure of the contractor to fulfill its terms and the buildings were completed by the home authorities. Under proceedings in equity instituted by the home and its general treasurer (cross bill being filed by the appellee) the conflicting claims and equities of the parties growing out of the contract and the proceedings thereunder, including the completion of the buildings by the home authorities, were fully tried out, with the result that appellee was by final decree held entitled to recover against the home the net amount of $21,139.12, after allowing in the latter's favor the payments made to appellee, the expense of completing the buildings and deductions on account of defects and omissions. To this sum was added interest from February 15, 1904, the date when (as stated in the decree) "the home went into complete possession of said property, using and enjoying the same for its purposes." In an opinion filed as basis for the final decree, the presiding judge stated that the home "had in its hands at the time of annulment reserved percentages, on its own estimate of work previously done, aggregating $23,353.00, or more than the principal sum now found to be due Parrish [appellee] on the basis of the accounting." The errors assigned challenge only the award of interest.

The general rule is well settled that interest is not allowed on claims against the United States or against a State unless either the Government has stipulated to pay interest or such interest is given by express statutory provision (Gordon vs. United States, 7 Wall., 188; Angarica vs. Bayard, 127 U. S., 251, 260; United States vs. North Carolina, 136 U. S., 211, 216, 217; South Dakota vs. North Carolina, 192 U. S., 286, 321; Bledsoe vs. The State, 64 No. Car., 392, 397). And by express statute such is the rule (as to interest before judgment) in suits against the United States in the Court of Claims and in the District and Circuit Courts of the United States under the Tucker Act (Rev. Stat., sec. 1091; Tillson vs. United States, 100 U. S., 43, 47; Harvey vs. United States, 113 U. S., 243, 248, 249). This suit is not in form against the United States. Appellants insist, however, that it is such in substance; that the National Home is
108 but an agency of the Federal Government: that the corporation known as the National Home for Disabled Volunteer Soldiers is organized merely as a means of carrying out the eleemosynary purposes of the United States in caring for its disabled soldiers; that

the activities of the home are thus those of the General Government; and that as any recovery against the home can in fact be paid only through congressional appropriation, the situation is to all practical intents the same as if the decree were rendered directly against the United States. We think the home is, in a proper sense, an administrative agency of the Federal Government. (Ohio vs. Thomas, 173 U. S., 276; Overholser vs. National Home, 68 O. St., 236.) The Circuit Court expressed the opinion that as the "suit is not against the Government directly, the strict rule of law forbidding the allowance of interest is not applicable, but that, as it is a suit against a national home as a governmental agency, in reference to a matter as to which it is specifically authorized to contract, interest may be allowed against it as against any other litigant upon equitable terms."

Whether, apart from the statutory authority given the home to make contracts and the power to sue and to be sued (to which we shall later refer), the case is taken out of the rule of nonliability for interest from the mere fact that the suit is not directly against the United States, we do not find it necessary to determine; nor did the learned judge who presided below decide that question. It is to be noted, however, that no case has been cited, nor has any been found by us, in which the rule of nonliability to interest has been applied elsewhere than in a proceeding directly against the Government, State or National, or one in which payment directly from the National or State Treasury was sought. The case of Bledsoe vs. State, supra, which was cited with approval in United States vs. North Carolina, supra, and on which case appellants place great reliance, is not strongly in point. In that case, although the claims under consideration were for supplies furnished the State asylum, they were under express constitutional provision audited by the court as claims against the State. The fact that the action of the court was only recommendatory to the legislature is not important. It is
109 further to be noted that in suits against collectors to recover moneys paid under protest, even though the recovery is by express statute payable directly from the United States Treasury, upon certificate of probable cause, recovery of interest is allowed (Erskine vs. Van Arsdale, 15 Wall., 75, 77; Kinney vs. Conant—C. C. A. 1—166 Fed., 720, 721; Treat vs. Farmers' Loan & Trust Co.—C. C. A. 2—185 Fed., 760); interest having, however, been denied in Redfield vs. Ystalyfera Iron Co., 110 U. S., 174, 176, on the ground of plaintiff's laches, and in Redfield vs. Bartels, 139 U. S., 694, 703, allowed, under the peculiar facts of that case, only from the commencement of suit.

But the act incorporating the home gave the board of managers "perpetual succession, with powers to take, hold, and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity; and to make by-laws, rules, and regulations, not inconsistent with law, for carrying on the business and government of the home, and to affix penalties thereto."

Appellants urge, however, that this statutory subjection to suit does not make the home liable to a recovery which the United States would not be liable to under a similar statute; that the law merely imposes a liability to suit as distinguished from a liability in suit. In support of this contention reliance is had upon cases such as Overholzer vs. National Home, supra; Maia vs. Eastern Hospital (97 Va., 507); Moody vs. State Prison (128 No. Car., 12); Lyle vs. National Home (170 Fed., 842); which hold that administrative Government agencies, State or Federal, are not liable to actions for torts arising through the negligence or misconduct of the officers of such institutions. These decisions seem to rest largely upon the proposition that statutes imposing power and liability to sue and to be sued relate to such matters only as are within the corporate powers of the defendant sued. But in the case before us the board of managers was expressly authorized to erect the buildings in question and, by necessary implication, to make contracts therefor. The contract on which recovery has been had was clearly within the statutory authority given the home. It is true that the statute did not expressly authorize
110 the awarding of interest in case of default on the part of the home in performing such contract. But it did of necessity impose liability for damages for breach of the contract.

Against debtors generally interest is awarded not only by virtue of contract therefor, express or implied, but, under proper circumstances and in the exercise of a proper discretion, as compensation for delay or default of the debtor. (United States vs. Sherman, 98 U. S., 565, 567; Treat vs. Farmers' Loan & Trust Co., supra, at pp. 760, 764.) The ground for refusal to allow interest against the Government is that "delay or default cannot be attributed to the Government. It is presumed to be always ready to pay its debts." (United States vs. Sherman, supra, at pp. 567, 568; Erskine vs. Van Arsdale, supra, at p. 77.) We are cited to no authority, and we have found none, holding that such presumption applies in favor of a governmental agency such as the home in question. Appellants urge that controlling analogies are suggested by decisions denying the application of the statute of limitations to suits by such governmental institutions (Eastern State Hospital vs. Graves' Committee, 105 Va., 151), denying liability of buildings under construction as governmental institutions to the provisions of mechanics' lien statutes (Phillips vs. University, 97 Va., 472), and denying liability to taxation of property held in trust for a State (Auditor General vs. Regents, 83 Mich., 467). But, in our opinion, such analogies are not complete. The statute incorporating the home, construed in connection with the act providing for the erection of the buildings, made the home liable in suit to damages for noncompliance with its contract. While the question is not free from difficulty, nor its solution entirely clear, we think the liability imposed by these statutory provisions, included by natural implication the usual elements of applicapable damage, including interest, in a proper case and in the exercise of a proper discretion, for delay and default in performance. The fact of the omission from the statutes referred to of any provision

for exemption from interest, as is expressly contained in the Tucker Act relating to suits directly against the United States, is, we
111 think, significant. Had Congress intended the claimed immunity, it would seem natural to have so declared. That the case presented is a proper one for the allowance of interest (if allowable under any circumstances against a governmental agency) is clear. As said by the presiding judge below: "It [the home] obtained possession of the buildings shortly after the annulment, and the buildings were completed, as reported by the master and agreed by counsel at bar, on or before February 15, 1904, since which time it has been in complete possession of the property, using and enjoying the same for its charitable purposes." As already said, interest was awarded only from February 15, 1904, and an award of principal and interest combined will, as said by the trial judge, "result in an aggregate decree for less than the reasonable value of the property which it [the home] obtained at the annulment, as otherwise fixed on a quantum meruit basis."

We think the decree of the Circuit Court is right and should be affirmed, but without costs of this court, as the appeal was taken by direction of the Department of Justice of the United States Government. (Rev. Stat., sec. 1001; C. C. A. Rule No. 31; Treat vs. Farmers' Loan & Trust Co. (C. C. A. 2), 185 Fed., 760, 763, 765.)

112 And afterwards, to wit, on May 25, 1912, a petition for appeal was filed, which reads and is as follows:

[Address reply to "The Attorney General" and refer to initials and number W. R. H. G. E. H. 111311-9.]

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT,
DEPARTMENT OF JUSTICE,
Washington, D. C., May 18, 1912.

SAMUEL C. WILLIAMS,
Johnson City, Tenn.

SIR: Referring to your letter of the 15th ultimo, relative to the recent decision of the Circuit Court of Appeals for the Sixth Circuit in National Home for Disabled Volunteer Soldiers et al. vs. J. E. Parrish, I beg to state that the department concurs with you in the conclusion that an appeal should be taken to the Supreme Court.

You are accordingly authorized to take such action. If you wish the United States attorney at Knoxville to assist with reference to the appeal, the department will be pleased to instruct him to do so.

113 Of course the case will be handled by this department when it reaches the Supreme Court.

Respectfully,

W. R. HARR,
Assistant Attorney General.
(For the Attorney General.)

Exhibit to petition for appeal.

United States Circuit Court of Appeals for the Sixth Circuit.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS et al., appellants,
v.
J. E. PARRISH, APPELLEE. } #2186.

Petition for appeal to the Supreme Court of the United States.

The appellants above, the National Home for Disabled Volunteer Soldiers, a body corporate under the laws of the Congress of the United States, and Major Moses Harris, general treasurer thereof, respectfully show that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Sixth Circuit, and that a judgment has been rendered therein on the 1st Monday of April, A. D. 1912, affirming the decree of the Circuit Court
114 of the United States for the Eastern District, Northeastern Division of Tennessee, at Greeneville; and that the matters in controversy in said suit, on said appeal to the U. S. Circuit Court of Appeals and on this appeal, exceeds one thousand dollars ($1,000.00) above costs; that this cause is one in which the United States Circuit Court of Appeals for the Sixth Circuit had and has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal, involving contentions (a) that the complainants and appellants are in substance the agencies of the United States of America, with status and rights in law and equity of that sovereignty; (b) a suit by and, on cross bill, against a corporation, said National Home for Disabled Volunteer Soldiers, so created by an act of the Congress of the United States; and (c) the construction of the said act of Congress incorporating the National Home for Disabled Volunteer Soldiers in respect of its powers and liabilities as an incorporated governmental agency.

Wherefore the said appellants pray an appeal to be allowed
115 in the above-entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Sixth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said appellants may be reviewed; and if error be found, corrected according to the laws and customs of the United States.

Further, that it be ordered that, on the direction of said appeal from the Department of Justice of the United States, hereto attached as a part of this petition, said appeal may be prosecuted without necessity of execution of bond by said appellants, under and in accord with the provisions of R. S., sec. 1001; U. S. Comp. Stat., 1901, p. 713.

SAML. C. WILLIAMS,
Solicitor for Appellants.

And on the same day, to wit, May 25, 1912, an assignment of errors was filed which reads and is as follows:

116 United States Circuit Court of Appeals for the Sixth Circuit.

NATIONAL HOME FOR DISABLED SOLDIERS ET AL., appellants, *vs.* J. E. PARRISH, APPELLEE. } # 2186.

Bill and cross bill in equity.

Comes the complainants, the National Home for Disabled Volunteer Soldiers and Moses Harris, general treasurer thereof, and file the following assignment of errors upon which they will rely upon their prosecution of appeal from the decree made by this honorable court on the 1st and 2nd day of April, 1912, in the above-entitled cause.

Assignment of errors.

I. That the honorable Circuit Court of Appeals, aforesaid, erred in said decree in respect of and in the allowance of interest against appellants, said complainants, both and either of them, on the balance found due and payable under the construction contracts entered into by them with defendant Parrish for the construction of the hospital group on the Mountain Branch Reservation of the
117 National Home for Disabled Volunteer Soldiers, and in the construction of the act of Congress incorporating the National Home for Disabled Volunteer Soldiers, in respect of the liability for interest on its contracts.

II. Said court erred in not sustaining the contention of appellants that said contracts being with complainant, National Home for Disabled Volunteer Soldiers, a body corporate under the laws of the United States, created by the United States of America as an arm of the Government in the administration of a charity, and with appellant, Moses Harris, general treasurer, as an officer of the Government, interest should not be awarded against it, him, or them, it not appearing from any act of Congress or by said construction contracts or any lawful contract that consent or agreement to pay interest is manifested: U. S. vs. North Carolina (136 U. S., 211); Bledsoe v. State (64 N. C., 392, 397); Moody v. State Prison (128 N. C., 12, 53 L. R. A., 855); State v. Thompson (10 Ark., 65); Eastern Hospital v. Winston (105 Va., 151, 3 L. R. A. (N. S.), 747; 8 Am. & Eng. An. Cas., 701; U. S. v. Beebe (127 U. S., 338); U. S. v.
118 Bayard (127 U. S., 251); Wrightman v. U. S. (23 Ct. Cl., 144); Carr v. State (11 L. R. A., 376); Houston v. State (42 L. R. A., 49); Tilson v. U. S. (100 U. S., 43); Harvey v. U. S. (113 U. S., 243); Ohio v. Thomas (173 U. S., 276); Overholser v. National Home for D. V. S. (62 L. R. A., 936); Lyle v. N. H. D. V. S. (170 Fed., 846).

Wherefore, the said complainants, as plaintiffs in error, in order that the foregoing assignment of errors may be and appear of record, present the same to the court and pray that such disposition be made

thereof as in accordance with law and the statutes in such cases made and provided, and complainants pray for a reversal of said decree aforesaid.

SAM'L C. WILLIAMS,
Solicitor for Complainants and Appellants.

And on the same, to wit, May 25, 1912, the affidavit of John P. Smith as to amount in controversy was filed in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers et al., appellants, *vs.* J. E. PARRISH, APPELLEE. | # 2186. In equity.

119 *Affidavit.*

STATE OF TENNESSEE, *Washington County, ss:*

John P. Smith, residing on and governor of the Mountain Branch of the National Home for Disabled Volunteer Soldiers, located in said State and county, being duly sworn, on his oath says that he is such governor and as such is personally acquainted with the business affairs of said branch; that the contracts involved herein were for the construction by appellee Parrish of the hospital group of said branch; that the amount involved in this appeal is in excess of one thousand dollars, exclusive of costs, to wit, about eight thousand dollars, by way of interest before judgment on liability sum under said construction contracts.

JOHN P. SMITH, *Governor, etc.*

Sworn to and subscribed before me this the 24th day of May, 1912. My commission as notary public expires on the 22nd day of February, 1913.

[SEAL.] G. T. LEE, *Notary Public.*

120 And afterwards to wit on May 28, 1912, an order allowing appeal was filed in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers et al., appellants, *vs.* J. E. PARRISH, APPELLEE. | #2186. In Equity.

Order for appeal.

It is hereby ordered that the appeal in the above-entitled cause to the Supreme Court of the United States be and is hereby granted, and as prayed without bond on direction to appeal from the Department of Justice of the United States to that end.

LOYAL E. KNAPPEN,
U. S. Circuit Judge for the Sixth Circuit.

Dated May 27, 1912.

121 Supreme Court of the United States.

Pending in U. S. Circuit Court of Appeals, Sixth Circuit.

NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers et al., appellants, *v.* J. E. PARRISH, APPELLEE. } In Equity.

Citation.

To J. E. PARRISH:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Sixth Circuit, wherein the National Home for Disabled Volunteer Soldiers and Major Moses Harris, general treasurer thereof, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the honorable Loyal E. Knappen, judge of the United States Circuit Court of Appeals for the Sixth Circuit, this 27th day of May, A. D. 1912.

LOYAL E. KNAPPEN,
Judge United States Court of Appeals, Sixth Circuit.

122 (Indorsed:) No. 2186. United States Circuit Court of Appeals, Sixth Circuit. National Home for Disabled Volunteer Soldiers et al. vs. J. E. Parrish. Citation. Service accepted this May 31, 1912. Shields, Cates & Mountcastle, attorneys for J. E. Parrish.

123 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings, together with the original citation in the case of National Home for Disabled Volunteer Soldiers et al. vs. J. E. Parrish, No. 2186, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at the city of Cincinnati, Ohio, this 3rd day of June, A. D. 1912.

[SEAL.] FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

IV (Indorsed:) File No. 23253. U. S. Circuit Court Appeals, 6th Circuit. Term No. 678. The National Home for Disabled Volunteer Soldiers and Major Moses Harris, general treasurer thereof, appellants, vs. J. E. Parrish. Filed June 12, 1912. File No. 23253.

○

FILE COPY.

Supreme Court, U. S.
FILED.
APR 29 1913
JAMES H. McKENNEY,
CLERK

No. 678.

In the Supreme Court of the United States,

OCTOBER TERM, 1912.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS ET AL., APPELLANTS,

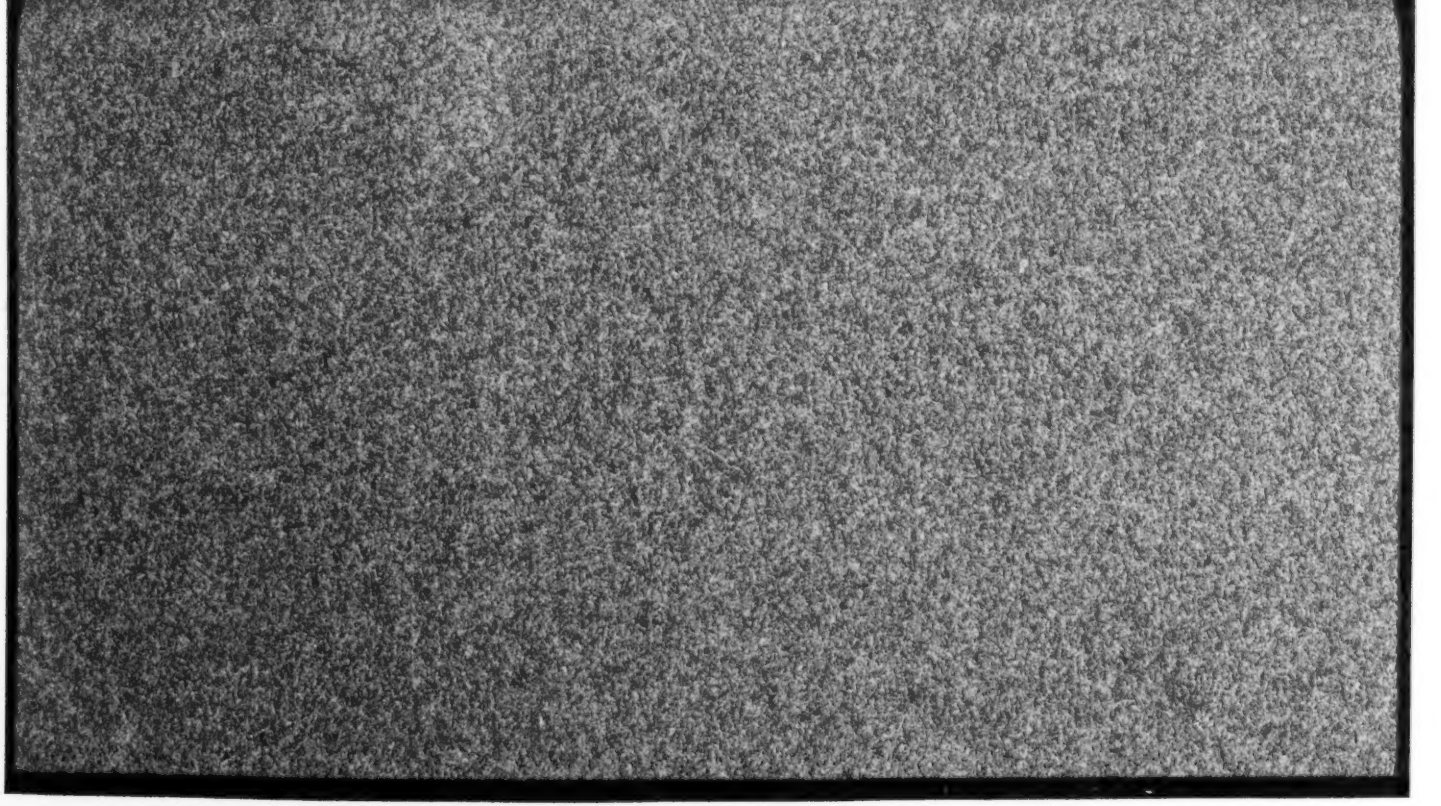
v.

J. E. PARRISH, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE FOR SUBMISSION ON PRINTED BRIEFS.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1913



In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS et al., appellants,
v.
J. E. PARRISH, APPELLEE.
No. 678.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE FOR SUBMISSION ON PRINTED BRIEFS.

On behalf of the United States and of opposing counsel, the Attorney General respectfully moves the court to advance the above-entitled cause for immediate submission on printed briefs without oral argument.

This was a suit in equity brought in the Circuit Court by appellant, a Federal charitable corporation, to enforce its right to annul a construction contract with appellee for the latter's default thereunder. Appellee answered and filed a cross bill, denying complainant's right to annulment, and seeking to recover the contract price, with damages.

The final decree awarded appellee $21,242.06, the balance due under his contract, and allowed him interest thereon from the completion of the buildings, $8,496.82. The principal was paid, but an appeal was taken from the allowance of the interest. The decree was affirmed in the Circuit Court of Appeals.

The case presents but one question: whether interest is allowable on a contract claim against a Federal charitable corporation created and existing for purely governmental purposes.

The original bill was filed on August 22, 1903. Judgment was rendered in the Circuit Court in October, 1910, and affirmed by the Circuit Court of Appeals in April, 1912, and the record was filed here June 12, 1912.

It is the desire of the parties to submit the case on briefs without argument, and it is hoped that the court will permit the submission now instead of at the next term, when it may be submitted under Rule 20.

JAMES C. MCREYNOLDS,
Attorney General.

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FILE COPY.

SUPR. COURT, U. S.
FILED.
APR 26 1913
JAMES H. McKENNEY,
CLERK.

No. 678.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS ET AL., APPELLANTS,

v.

J. E. PARRISH, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLANT.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1913

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE NATIONAL HOME FOR DISABLED Volunteer Soldiers et al., appellants, *v.* J. E. PARRISH, APPELLEE. } No. 678.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This case presents the single question whether interest is recoverable in a contract action against a Federal corporation created by Congress for the sole purpose of administering a governmental charity and conducted under the direct supervision of the United States Government.

The appellant corporation was created by act of March 3, 1865 (13 Stat., 509), as amended by act of March 21, 1866 (14 Stat., 10), as "an establishment for the care and relief of the disabled volunteers of the United States Army," with power to sue and be

sued, and to acquire sites for military asylums and erect the necessary buildings. (See secs. 4825 to 4837, inclusive, of the Revised Statutes.)

On November 19, 1901, and March 8, 1902, the Home entered into contracts with appellee for the construction of certain buildings in Washington County, Tenn. (R., 3, 64.) The contract provided that in case the contractor failed, in the judgment of the architect in charge, to prosecute the work diligently and faithfully according to specifications, the Home might annul the contract by notice in writing and complete the work by open purchase or contract. (R., 65.)

The dates originally set for completion of the work under the contracts were, respectively, November 18, 1902, and January 7, 1903. (R., 4, 65.) Extensions were granted, however, the final extension being until August 15, 1903. (R., 5.) Upon that date, appellee not having complied with his contract, the required notice of annulment was given. (R., 5, 12.) Appellee, however, refused to quit the premises or withdraw his workmen (R., 5); and appellants thereupon filed a bill in the Circuit Court, praying for an injunction to compel his removal, and for an accounting. (R., 2, 7.) An answer and cross bill were filed by appellee, denying that the facts justified the order of annulment and seeking a recovery of the contract price, with damages. (R., 8, 20, 56.)

The Circuit Court held that the Home was justified in annulling the contract on account of substantial delays and defects in its performance; but that

appellee was entitled to recover the original contract price (as modified by the cost of certain extras, omissions, and modifications) less the payments actually made to appellee and the reasonable cost to appellant of completing the buildings. (R., 69.) The final decree, filed October 8, 1910, awarded recovery in the principal sum of $21,242.06, with interest thereon from February 15, 1904, the date of completion of the buildings, amounting to $8,496.82; in all, $29,738.88. (R., 72–77.) This decree was amended on January 6, 1911, by a deduction of $102.94, leaving $29,635.94 as the amount of appellee's recovery. (R., 77–79.) The principal has been paid, and this appeal involves only the interest.

Appellants assigned error to the allowance of interest, and by direction of the Attorney General took the case to the Circuit Court of Appeals, where judgment was affirmed. (R., 79, 86.) Thereupon appellants, with the authority of the Department of Justice, prosecuted the present appeal under secs. 128 and 241 of the Judicial Code. (R., 90–94.)

SPECIFICATION OF ERROR.

The Circuit Court of Appeals erred in holding that appellant was liable for interest.

BRIEF OF ARGUMENT.

I. The National Home, as a governmental agency, is subject to the rule that interest can not be recovered against the Government without its express consent.

(*a*) The Home a governmental agency.

(*b*) The general rule.

(*c*) Its application to the case at bar.

(1) In reason;

(2) Under the authorities;

(3) By analogy.

II. The power to sue and be sued, conferred on the Home by its charter, does not render it liable to the payment of interest.

(*a*) Restricted scope of this charter power in the case of public charitable corporations.

(*b*) Distinction between capacity to be sued and liability in a suit.

(*c*) This power does not amount to an express authorization by Congress of the recovery of interest.

ARGUMENT.

I. The National Home, as a governmental agency, is subject to the rule that interest can not be recovered against the Government without its express consent.

(*a*) *The Home a governmental agency.*

The Home is under the direction of twelve managers. Three of these are the President, the Secretary of War, and the Chief Justice; the others are elected by Congress. (R. S., §§ 4825–4827.) Estimates for its support are included in the estimates for the War Department; it is wholly dependent upon Congress for its maintenance. (18 Stat., 343, 359; 24 Stat., 222, 251.) Its inmates are subject to the rules and articles of war as though they were in the Army. (R. S., § 4835.)

This court has defined the status of this institution. In *Ohio* v. *Thomas* (173 U. S., 276), the governor of the Central Branch of the Home, situated in Ohio, was convicted by a court of that State of furnishing oleomargarine to its inmates in violation of a State statute, and sued out a writ of *habeas corpus*. It was held that since the Home was a Federal institution, created by and under the sole and exclusive jurisdiction of Congress, its governor, as a Federal officer, was not amenable to State law for an act done by virtue of congressional authority.

To the same effect are *Overholser* v. *National Home for Disabled Soldiers* (68 Oh. St., 236), and *Lyle* v. *National Home for Disabled Volunteer Soldiers* (C. C. Tenn.) (170 Fed., 842), both of which hold that the Home, in spite of its capacity to be sued, is not liable in damages for a tortious use of its land to the injury of adjoining property. The Home, declared the Ohio court, is a public corporation discharging only governmental functions, and a suit against it is virtually a suit against the Government and its property. (68 Oh. St., 248, 250.)

This fact seems obvious without the citation of authority. A corporation without shares or stockholders, organized not for profit but solely to discharge the Government's debt of gratitude toward those disabled in its service and defense, and under the direct control of the administrative and legislative branches, is nothing more than an arm of that Government, and incapable of acting in other than a governmental capacity.

Any exemption from liability, therefore, which exists in favor of the Government should equally apply to this corporation in the absence of expressed provision by Congress to the contrary.

(*b*) *The general rule.*

The liability of the Government, whether State or Federal, to pay interest on claims against it, is well defined. Interest is never recoverable unless the sovereign has expressly assumed the obligation therefor, either by legislative permission or authorized contract stipulation.

> *United States* v. *Sherman*, 98 U. S., 565.
> *Tillson* v. *United States*, 100 U. S., 43.
> *Harvey* v. *United States*, 113 U. S., 243, 249.
> *Angarica* v. *Bayard*, 127 U. S., 251.
> *United States* v. *North Carolina*, 136 U. S., 211.

This principle is embodied in § 1091 of the Revised Statutes so far as suits in the Court of Claims are concerned. (*Tillson* v. *United States*, *supra*.) The rule existed at common law, however, and applies to the Federal Government in the absence of statutory enactment. (*United States* v. *Sherman*, *supra*; *Angarica* v. *Bayard*, *supra*.)

The requirement that the assent of Congress to such liability must be *express*, has been strictly adhered to. A special statute authorizing recovery against the United States in a certain case or class of cases does not justify the court in awarding interest

upon the claim unless Congress has declared that to be its intention in explicit terms.

Tillson v. *United States, supra.*

Harvey v. *United States, supra.*

United States v. *Barber* (C. C. A. 5th C.), 74 Fed., 483.

Watts v. *United States* (D. C. N. Y.), 129 Fed., 222.

Pennell v. *United States* (D. C. Me.), 162 Fed., 75.

(*c*) *Its applicability to the case at bar.*

(1) The principle upon which the rule rests is commonly stated to be that "delay or default can not be attributed to the Government. It is presumed to be always ready to pay what it owes." (*United States* v. *Sherman, supra,* 567, 568; *United States* v. *South Carolina, supra,* 217.) This must mean that where such delay has occurred through the act or laches of an officer, the State can not, on grounds of public policy, be made to bear the burden of such official neglect without its consent. Again, the rule may be explained upon the broad doctrine of the sovereign's immunity from liability not expressly submitted to.

Upon either assumption, however, the reason of the rule applies as strongly to a governmental agency like the appellant as to the Government itself. The delay or default of the Home, if any there be, is the delay or default of the Government acting (as a Government can only act) through its agents—in this instance the officers of the Home. (*Ohio* v. *Thomas, supra.*) Any liability incurred by the Home is the

liability of the Government, and must be met by appropriation of public funds like any other public debt. To say that neglect can be imputed to the Home, although not to the Government; or that public policy protects the taxpayers from official carelessness under a Government contract, but not under a contract made in terms with a governmental agency, is to disregard substance and embrace form.

Again the immunity of the sovereign, to be more than nominal, must extend to its agencies, whatever their nature or shape; to an arm of government clothed with the corporate entity as to a department thereof, or its head in his official capacity. An officer who makes an authorized contract for his Government incurs no personal liability thereon. (*Hodgson* v. *Dexter*, 1 Cranch, 345; *District of Columbia* v. *Camden Iron Works*, 181 U. S., 453, 460.) A claimant can not, by bringing mandamus against the Secretary of State, or of the Treasury, compel that officer to pay over interest from public funds in his custody, unless the United States would be liable for that interest in a direct action. (*United States* v. *Sherman*, *supra; Angarica* v. *Bayard*, *supra.*) It should be equally impossible to compel this corporation—acting as a mere conduit of Federal authority—to respond in damages which could not, in the absence of that conduit, be recovered from the Government itself.

(2) While there are no cases squarely in point, the trend of the authorities favors the view here advanced.

Certain cases cited below by appellee may be readily disposed of.

Erskine v. *Van Arsdale* (15 Wall., 75) was an action against a collector of internal revenue, to recover back taxes illegally exacted by him and paid under protest. A judgment awarding interest from the date of the illegal exaction was sustained by this court.

This decision was followed in *Redfield* v. *Ystalyfera Iron Co.* (110 U. S., 174) and *Redfield* v. *Bartels* (139 U. S., 694).

The liability enforced in these cases was primarily a personal one. At common law, a revenue officer was individually liable for moneys collected illegally and paid under protest, even though he acted in good faith and under instructions from his superior. (*Elliott* v. *Swartout*, 10 Pet., 137, 156.) In the United States, the Federal Government has stepped in and taken over this liability by statute, thus relieving the collector. (*Arnson* v. *Murphy*, 109 U. S., 238, 243; *Treat* v. *Farmers' Loan and Trust Co.*, 185 Fed., 760.) It is but natural, however, that those statutes should not be held to have altered the nature or extent of the obligation. Since the revenue officer was obliged to pay interest as an individual, it follows that the Government, standing in his shoes, becomes subject to the same measure of damages. The difference between this and the case at bar is obvious. One is the assumption of an existing personal liability; the other the extension of the governmental liability to a new entity, the corporation appellant.

A well-recognized distinction exists between an officer's personal liability of an officer for tortious or unlawful acts done under the alleged authority of the State, and his responsibility as a representative of his Government, and upon that distinction often depend the nature and extent of the remedy against him and the court's jurisdiction of the suit. (See *Stanley* v. *Schwalby*, 147 U. S., 508, 512, 518.) And a like distinction between personal and representative *rights* determines the availability against the officer of defenses to which the State is not subject. (*Wasteney* v. *Schott*, 58 Oh. St., 410.) The underlying principle of course is that the court will look behind the parties of record to determine the real parties in interest and that respective rights and liabilities will be governed accordingly.

New Hampshire v. *Louisiana*, 108. U. S., 76.
United States v. *Beebe*, 127 U. S., 338.
Belknap v. *Schild*, 161 U. S., 10.

In this connection, the cases dealing with the court's jurisdiction of a suit against the officers of a State, under the 11th amendment to the Constitution, may prove enlightening.

In re Ayers, 123 U. S., 443, decided that a Federal court could not entertain jurisdiction of a suit to restrain the attorney general of a State from enforcing a State statute alleged to impair the obligation of complainants' contract with the State. For, said this court, since the only matter complained of was the violation by the State of its contract and the threatened act of its attorney general in furtherance

thereof, the latter was obviously sued in his representative capacity merely; hence the State was the real party in interest. A different situation is presented when an officer is sued for a tort committed under color of a void statute. He has then perpetrated in his own person a legal wrong and his alleged authority for his act is a nullity. But a *contract* can not be violated save by a party or an agent acting as such; and so the action was predicated on the official character of the act complained of and the actor. (123 U. S., 486–492, 498, 506.)

This decision was affirmed in *McGahey* v. *Virginia* (135 U. S., 662, 684).

Mutatis mutandis, the doctrine of the Ayers case applies here. The present suit is for the enforcement of a contract which is virtually with the Government, although nominally with the corporation. That body, however, unlike an individual officer, has no dual capacity to confuse the issue. It is an arm of Government—nothing more; and to talk of it as acting in a personal capacity is absurd. Both in making the contract and its conduct thereunder it acted merely as a representative of the Government. Its liability should therefore be that of the Government, neither more nor less; for clearly, the United States is the real party in interest.

(3) *By analogy:*

> In several respects the rights and liabilities of corporations like the appellant have been assimilated by those of the States they represent.

Thus, a public charitable corporation, whether or not authorized to sue and be sued, is not liable in *tort* for personal injuries resulting from the malice or negligence of its employees.

Maia v. *Eastern State Hospital*, 97 Va., 507.

Williamson v. *Louisville Industrial School*, 95 Ky., 251.

Moody v. *State Prison*, 128 N. C., 12.

Nor is it subject to *mechanics' lien* laws unless expressly mentioned therein.

Thomas v. *Industrial Union*, 71 Ill., 310.

Patterson & Co. v. *Pa. Reform School*, 92 Pa. St., 229.

Phillips v. *Univ. of Va.*, 97 Va., 472.

Nor does the *statute of limitations* run against such an institution.

Eastern State Hospital v. *Graves*, 105 Va., 151.

Cox v. *Board of Trustees of Univ. of Ala.*, 161 Ala., 639.

These cases, and the reasoning on which they stand are persuasive in the present controversy. If a mechanic's lien can not be filed against a public institution, it is difficult to see why interest should be allowed against it. Both are ordinary incidents to a recovery for breach of contract.

It is also noteworthy that an early American case deduced the rule that interest was not recoverable against the State from the similar rule as to the statute of limitations, placing both "upon the

ground that the State is never presumed in default or derelict of duty." (*State* v. *Thompson*, 10 Ark., 65.)

Unless, therefore, the recovery of interest against the appellant corporation was expressly authorized by Congress, such recovery was improperly allowed by the court below.

II. The power to sue and be sued, conferred on the home by its charter, does not render it liable to the payment of interest.

It must be borne in mind that unless this clause in the charter amounts to express consent by Congress to the payment of interest, it is insufficient to take the case out of the general principle heretofore discussed. The sole question is, therefore, whether the clause meets this requirement.

(*a*) *Restricted scope of this charter power in the case of public charitable corporations.*

We have seen that this clause in its charter does not render such a corporation generally liable in tort, nor subject to mechanics' lien laws. The courts are loath to take away by implication the privileges and immunities of the sovereign which normally adhere to these public functionaries. Thus the rule as to torts has been explained on the ground that its powers were granted to the public body to be exercised exclusively for governmental purposes, which of course did not include the commission of a tort nor the payment of damages therefor.

(*Maia* v. *Eastern State Hospital*, *supra*.)

(*b*) *Distinction between capacity to be sued and liability in a suit.*

It is submitted that an adherence to this distinction explains the cases above adverted to and furnishes a clear and reasonable interpretation of the clause in the charter.

The corporation derives none of its substantive liability from the provision that it may be sued. That merely serves to remove the immunity from suit which would otherwise attach to it as a governmental agency. The liability it can incur when such immunity is removed depends upon rules of substantive law and the other provisions of its charter. There is nothing in those provisions which authorizes a recovery of interest. The suggestion made below that the power to contract for the erection of buildings, coupled with the capacity to be sued, amounts to such an authorization, is without force. It ignores the principle heretofore established—that *express* consent is necessary to subject a governmental agency to liability for interest. The power to contract and the capacity to be sued are both possessed by the Federal Government itself; they do not render it liable for interest on its contracts.

(*c*) *This power, therefore, does not amount to an express authorization by Congress of the recovery of interest.*

This follows of necessity from the foregoing discussion. But a bare inspection of the clause in question leads to the same result. A permission

to sue and be sued does not, in the fair meaning of the words, express as the clear intention of Congress that its creature shall be liable for interest. An express assent is not to be inferred by a process of elaborate implication.

It follows that the charter of appellant corporation did not affect its liability to pay interest.

CONCLUSION.

The judgment of the Circuit Court of Appeals was erroneous, and should be reversed.

JESSE C. ADKINS,
Assistant Attorney General.
KARL W. KIRCHWEY, *Attorney.*

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No. 678

IN THE

Supreme Court of the United States.

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JAMES H. McK

OCTOBER TERM, 1912.

National Home for Disabled Volunteer Soldiers and Major Moses Harris, General Treasurer thereof,
APPELLANTS,

vs.

J. E. Parrish,
APPELLEE.

Appealed from the U. S. Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF OF APPELLEE, J. E. PARRISH.

R. E. L. MOUNTCASTLE,
Attorney for Appellee.

SHIELDS & CATES,
Of Counsel.

MC CONAT MERCER JACKSON, TENN.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

National Home for Disabled Volunteer Soldiers and Major Moses Harris, General Treasurer thereof,
Appellants,

vs.

J. E. Parrish,
Appellee.

Appealed from the U. S. Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF OF APPELLEE, J. E. PARRISH.

The assignment of error from the decree of the Court of Appeals raises the single question as to whether or not the Circuit Court of Appeals and the Court below were in error in allowing interest to appellee on the admittedly just decree granted appellee in the Court of first instance from the date of the completion of the buildings, to-wit, February 15th, 1904.

A significant statement of the argument and of the reasons for the allowance of interest is shown

in the record from the opinion of Judge Sanford, District Judge, as follows:

> "As to the question of interest, I have had great doubt. Interest is not to be awarded on a claim against a sovereign government, unless its consent to pay interest has been manifested by an Act of its Legislature, or by a lawful contract of its executive officers. *Angarica vs. Bayard*, 127 U. S., 251, 260; *United States vs. N. C.*, 136 U. S., 211, 216. And it is expressly provided that the Court of Claims shall not allow interest upon any claim against the government unless upon a contract expressly stipulating therefor. R. S., 1091. *Tillman vs. United States*, 100 U. S., 43; *Harvey vs. United States*, 113 U. S., 243. And this inhibition, it has been held, likewise applies in suits to enforce claims against the Government brought in other Federal Courts under the Act of March 3, 1887, or other special Acts not authorizing a recovery of interest. *Baxter vs. United States* (C. C. A. 8 C.), 51 Fed., 671; *United States vs. Barker* (C. C. A. 5 C.), 74 Fed., 483; *Watts vs. United States* (D. C.), 129 Fed., 222.
>
> "It has, however, on the other hand, been repeatedly held by the Supreme Court that in a suit brought against a collector of customs to recover taxes illegally collected, interest, in a proper case, may be allowed in the discretion of the Court. *Urskine vs. Van Arsdale*, 15 Wall., 75; *Redfield vs. Iron Co.*, 110 U. S., 174; *Redfield vs. Bartels*, 139 U. S., 694.
>
> "Without determining to what extent, if

any, the opinion in *Redfield vs. Bartels* overrules or modifies the general principle stated in *United States vs. North Carolina, supra,* as applied to a direct claim against the Government, I am of the opinion that, in any event, the general doctrine stated in the North Carolina case does not apply so as to prevent the allowance of interest on a claim which is not directly against the Government, but against a corporation, such as the National Home, which, although a Governmental Agency, is sued on a claim growing out of matters directly within the scope of its corporate authority.

"After careful consideration, I held in *Lyle vs. National Home* (C. C.), 170 Fed., 842, that a National Home, being a charitable institution engaged as an agency of the Federal Government in the discharge of a Governmental function, is not subject to suit in an action sounding, in tort, the power to 'sue and be sued in courts of law and equity' conferred on the corporation by Rev. St. 4825, being limited to matters within the scope of the other corporate powers with which it is vested. One of these specific powers is, however, that of procuring sites and having necessary buildings erected. Rev. St. 4830. However, as this necessarily implies the power to contract for the erection of buildings, a suit against a National Home arising out of a contract for the erection of its buildings is clearly not within the rule laid down in the Lyle case. And the National Home being, in my opinion, subject to suit, although a Government agency, in reference to its contract for the erection of buildings,

I see no reason why such suit should not be conducted upon general principles of law, and interest allowed against it in matters growing out of such contract, where interest would be equitably allowed against a private individual. In the present case, the Home contracted for the buildings, and agreed to pay Parrish the amounts due in monthly installments, reserving 10 per cent. until delivery and acceptance, and had in its hands at the time of annulment reserved percentages, on its own estimate of work previously done, aggregating $23,353.00, or more than the principal sum now found to be due Parrish on the basis of the accounting. It obtained possession of the buildings shortly after annulment and the buildings were completed, as reported by the Master, and agreed by counsel at bar, on or before February 15, 1904, since which time it has been in complete possession of the property, using and enjoying the same for its charitable purposes.

"On the whole, I conclude that as this suit is not against the Government directly, the strict rule of law forbidding the allowance of interest is not applicable, but that as it is a suit against a National Home as a Governmental agency, in reference to a matter as to which it is specifically authorized to contract, interest may be allowed against it as against any other litigant upon equitable terms. I accordingly find that the decree in favor of the cross-complainant should bear interest from February 15, 1904, the date of completion of the buildings. In reaching this conclusion, I have resolved the doubt as

to the legal question involved in favor of what appears to me to be clearly the equities of the case, it being, in my judgment, manifestly inequitable that the Home should have had the use and possession of the property during all these years, retaining in its hands the balance due to the cross-complainant,and should not be chargeable with interest thereon. And even this result, it will be seen, will result in an aggregate decree for less than the reasonable value of the property which it obtained at the annulment, as otherwise fixed on a *quantum meruit* basis.

SANFORD, *Judge.*"

The same subject is thoroughly reviewed in the opinion of the Court of Civil Appeals in this language:

"While the question is not free from difficulty, nor its solution entirely clear, we think the liability imposed by these statutory provisions, included by natural implication the usual elements of applicable damage, including interest, in a proper case and in the exercise of a proper discretion, for delay and default in performance. The fact of the omission from the statutes referred to of any provision for exemption from interest, as is expressly contained in the Tucker Act relating to suits directly against the United States, is, we think, significant. Had Congress intended the claimed immunity, it would have seemed natural to have so declared. That the case presented is a proper one for the allowance of interest (if allowable under any

circumstances against a governmental agency) is clear."

(Tr., pp. 89, 90).

A stronger case for the exercise of the discretion of the Court in the allowance of interest, if the power rests in the Court, could not be presented than in the case at bar. It appears from the findings of the District Judge that at the time the authorities completed the Home and took complete possession thereof, said Home had at the time, belonging to Parrish, the sum of $23,353.00, as retained and reserved percentages on its own estimate of the work, or, as stated by the District Judge, " more than the principal sum now found to be due Parrish on the basis of the accounting." It likewise appears that not only did the Home retain possession of the completed structure and the retained percentages due Parrish on the completion of the work and which became accelerated by the annulment of the contract in Parrish's hands, but Parrish had in fact, according to the amount of *quantum meruit* found by the District Judge, put nearly $60,000.00 of his own money into said Home, which he never recovered and of which the Home had the full use, benefit and value, all of which money so paid out by Parrish under said contract he has lost except the $21,000.00, which is the amount of the decree herein, unappealed from as to the principal, and which is $2,000.00 less than his

own money retained in the hands of the Home, unless the interest is here allowed by the Court.

It is manifest, therefore, if the power is in the Court to grant the interest at all, the discretion is one which the Court should exercise, and the lower Courts having so exercised it with ample grounds, such exercise will not be disturbed by this Court.

This power to grant interest is denied by appellant upon the ground that the Home is the agency of the Government and therefore, without the Government's consent, interest could not be charged. Now there is no express authority granted in the Act creating the Home for the Government to be sued at all, and if this be treated as a suit against the Government, and the rights of appellee determinable only on that consideration, the appellee would have no right of action against the Home, even in the principal sum due, much less the interest; but the fact that the Home authorities are permitted to sue and be sued carries with it necessarily the right to sue and be sued with respect to those things committed by the Government to the action of said Home authorities, and in such case, when so committed to said Home authorities, the rights of action granted thereunder by implication carry such rights and remedies as are incident to other persons.

It is admitted by the appellant that no case exactly in point may be found and reliance is had upon the case of *United States vs. North Carolina,* 136 U. S., 216, and cases cited thereunder. Said suit was against North Carolina itself on bonds which the State had issued and which bonds only, together with the coupons, were to be paid at a certain date. The Supreme Court held that, while there was authority given by the State as a sovereign for the principal to be paid, yet in the absence of authority for the payment of interest, no judgment for interest could be granted. It was not contended that North Carolina would be liable to suit at all for the principal, except for the reason that it had agreed to be so liable.

The same is true as to the case of *United States vs. Sherman,* 98 U. S., 567, wherein the United States had received certain moneys through its officers and had agreed by Act of Congress to be liable for that amount and no more.

The principle of these cases is that the Government cannot be liable in a suit against it for anything more than it has contracted to be liable for, and the same was a suit directly against a sovereign on specific statutes defining the limit of recovery therein, and since the sovereign was liable only by virtue of the permission granted, the permission could not be extended, and said cases rest upon entirely different grounds from the principles controlling the case at bar, and it is clear that

if, in the cases referred to, there had not been the express consent of the sovereign to suit and recovery of the principal, not even the suit for the principal would have been successfully maintained.

If this were a suit against the United States in the sense in which the expression, "United States," is used in the cases referred to, the suit would not be maintainable in the first instance, it having been repeatedly held that a moneyed judgment cannot be maintained against the United States in any Federal Court except the Court of Claims. *Case vs. Terrell,* 11 Wall., 201. So it is manifest that the case at bar must be differentiated from an ordinary case against the United States. It is also to be admitted that there is no Federal Statute bearing upon the allowance of interest in a case of this sort. It is true there is a statutory bearing upon the question of interest upon claims triable and which pass through the Court of Claims, created by Congress, Section 1091 Revised Statutes, which is as follows:

> "No interest shall be allowed upon any claim up to the time of rendition of judgment thereon unless upon a contract expressly stipulating for the payment of interest."

The present case, however, is one which could not be set up in any Court of Claims. (Sec. 105-G et seq. of the Revised Statutes), and it is not in

fact set up in said Court. The National Home for Disabled Volunteer Soldiers is a corporate body, expressly vested by the Congress of the United States with the power to sue and be sued with respect to its contracts, which excludes it from the jurisdiction of the Court of Claims. It might well be said that a suit against a customs officer to collect excess duty paid under protest might be a claim referrable to the Court of Claims, or might be a claim founded upon a law of Congress, regulation of the Executive Department, or a contract expressed or implied with the Government of the United States, yet this Court in such a case, affecting the taxing power of the Government and seeking to reach its funds, has held that such demand against the customs officer where such excess duties have been collected, is entitled to bear interest from the date of the demand by suit, and discusses the question of interest in cases of this kind at length. *Redfield vs. Bartels,* 139 U. S., 695. See also *Redfield vs. Ysalyfera Iron Co.,* 110 U. S., 174-176. The Court in the Bartels case quotes approvingly from the decision in the 110 U. S. case, as follows:

> "Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for the default on the part of his debtor. Where it is reserved expressly in the contract or is implied by the nature of the premises, it becomes a part of the debt and is recoverable as of right; but when it is given as damages it is often a matter of discretion. In cases like

> the present, of recoveries for excessive duties paid under protest, it was held in *Erskine vs. Van Arsdale,* 15 Wall., 75, that the jury might add interest, the plaintiff ordinarily being entitled to it from the time of the illegal transaction."

The Court in the Redfield case allowed interest on the amount of money paid under protest and in a suit directly against the collector of the port as the agency of the Government, the said interest being allowable from the date process was served to recover the two several amounts, and without in fact any contract for interest, but based on the rights of the parties at law and so determined expressly by the Court.

Appellant has insisted that the above was a suit simply against the defendant individually, which of course is not true, as the suit is against him officially as the collector of a port and an officer and agent of the Government, and said suit was defended in this Court by the Assistant Attorney-General of the United States.

So also in the case of *Shanley vs. Herold,* 141 Fed., 423, the controversy was there on the inheritance tax, the same having been paid under protest, the defendant being a Revenue Collector, and he was held liable as an agency of the Government for the amount of money wrongfully collected as such agent and officer, and interest

was allowed upon the amount of the judgment payable out of the Treasury of the United States.

It is insisted by the appellants that certain decisions of various courts affirm the principle to the effect that a charitable corporation created as an entity in law by the State itself for Governmental purposes, and maintained by the State, should have applied to it the rules of law applied to the State of which it is a part, and that the cases cited are analogous to the case here presented. It is sufficient to say that said cases only show the application of the familiar rule of law that a public corporate body, whether created as an industrial school of reform or other charitable enterprise, cannot be held liable for assaults and batteries or other torts, or even negligence of said officers. And this is upon the ground of public policy. The functions of a State institution are governmental and their funds cannot be diverted from their intended beneficent purpose by damages caused by negligence of malicious servants. *Williamson vs. Industrial School,* 95 Ky., 25 (44 Amer. State Rep., 244). To the same effect is *Moody vs. State Prison of N. C.,* 53 L. R. A., 855, the latter Court saying:

> "Being an agency of the State, the State's Prison could only be sued when expressly authorized to be sued. The Statute incorporating the defendant does not contain the authority to sue and be sued. But even if such authority was given, it would cover only

> actions ordinarily incidental to its operations and would not extend to causes of action like the present. There is a distinct difference between conferring suability as to debts and other liabilities for which the State's Prison is now liable, and to extending liability for causes not heretofore recognized. The exemption of the State from paying damages for accidents of this nature does not depend upon its immunity from being sued without its consent, but rests upon the ground of public policy, which denied its liability for such damages.
>
> "As to the cities and towns, though by their charters they are broadly authorized 'to sue and be sued,' it is equally well settled that suability does not create any liability for damages caused by torts of their officers and agents when acting in governmental capacity."

See also the case of *Maia vs. Eastern State Hospital,* 97 Va., 47 L. R. A., 577. In this case, although the corporation was authorized to sue and be sued, yet the same was held not liable for injury to an inmate caused by the negligence or misconduct of persons in charge of the hospital, it being said in said case:

> "A distinction was drawn between powers and duties which were granted to or imposed upon a public body as an agency of the Government to be exercised and performed exclusively for public, governmental purposes, and those powers and privileges which are exercised by a corporation or body for its

> own private advantage, and are for public purposes in no other sense than that the public derived a common benefit from a proper discharge of the duties arising from the grant. For the negligent exercise of performance of the former class of powers and duties, it was held that the city was not liable, and as the injury complained of belonged to that class, it was held that the action would not lie, while it was admitted that, if the injury had resulted from negligence in the exercise of performance of the latter class of powers or duties, the city would have been liable in the same manner as an individual or private corporation."
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> "It was to recover the value of property which the defendant had the right to purchase for the maintenance of those intrusted to its care, and pay for out of the appropriation made for that purpose by the State; and the plaintiff's property having been converted to the use of the corporation for the same purposes for which it had authority to purchase it, it ought to have paid for it, and the Court very properly held that an action would lie to compel it to do so."

These cases really support the contention of appellee herein. If this had been an action against a charitable institution supported by the Government, for a tort or negligence of its officers, the cases cited in analogy would apply in defeat thereof. But in this case the same authorities support the proposition in our favor that, where the corporation is intrusted with certain

duties and powers, and acts under them, and incurs certain obligations thereby to others, these obligations may be enforced, with the same duties and incidents and remedies as allowed to other persons and governed by the same rules. When understood, with reference to the different classes of cases and the reasons underlying the same, there disappears any apparent inconsistency between the cases of *Redfield vs. Bartels* and *United States vs. North Carolina,* as adverted to in the opinion of the District Judge below. The distinction, we insist, is that in the case of *United States vs. North Carolina,* this was a suit brought in pursuance to a certain statute which had been passed by the State, limiting its own liability to suit for bonds. In such suit against a sovereignty, the litigant was limited to the express right granted. However, in *Redfield vs. Bartels,* against an agency of the Government, which had acted in the collection of certain revenues, the agency of the Government was held liable for the wrongful collection, and there being no statute contrary to the allowance of interest, and it being apparent that in the discretion of the Court interest should be allowable in such case, interest was allowed in the discretion of the Court. So that, if, in the case at bar, the United States, by charter to the National Home for Disabled Volunteer Soldiers, had provided that, while the corporation could be sued, it could be sued only for the principal and not for interest arising from any obligation created by the management of the

Soldiers Home, under said statute this restriction would have controlled, as in the North Carolina case, but giving the broad powers to sue and be sued, without discrimination as to the subject matter of suit, and allowing the Board of Managers of the Soldiers Home to contract, as they are especially authorized to contract, and this contract in the case at bar arising out of granted powers to the Soldiers Home, it becomes evident that the reasoning of the Court in the Redfield case, upon general principles of law and equity, controls the case at bar.

So that the case is reduced to this: if the National Home for Disabled Volunteer Soldiers, under this contract, is liable for the principal sum of $21,000.00, which is admitted, then that liability brings this case within the rule as to the liability of any other person or corporation, and allows interest to be taxed in the discretion of the Court, as was the case in *Redfield vs. Bartels,* and we therefore respectfully insist that the decree of the Court of Appeals should be affirmed.

Respectfully submitted,

R. E. L. MOUNTCASTLE,
Atty. for Appellee.

SHIELDS & CATES,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 678.—October Term, 1912.

The National Home for Disabled Volunteer Soldiers et al., Appellants, *vs.* J. E. Parrish.	Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

[June 9, 1913.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This appeal brings under review a decree allowing interest on the amount found due a contractor upon two contracts for the construction of buildings for the Mountain Branch of the National Home for Disabled Volunteer Soldiers.

The Home is a Federal corporation created by legislation now embodied in Rev. Stat. § 4825 *et seq.* as "an establishment for the care of disabled volunteer soldiers of the United States Army." The erection of the buildings was undertaken by the Home in pursuance of express Congressional authority and after an appropriation for that purpose had been made from the national treasury. 31 Stat. 745, c. 184. The contracts called for the completion of the work by the contractor on or before designated dates, which were extended. At the expiration of the last extension the contractor was in default, although the work was largely performed, and the Home, under power reserved in the contracts, proceeded with the completion of the buildings.

In a bill exhibited by the Home against the contractor, in the Circuit Court of the United States for the Eastern District of Tennessee, and in a cross-bill by the contractor, the parties presented for judicial determination various matters of difference arising out of the contracts and what was done under them. A hearing resulted in a decree awarding the contractor, upon the contracts, the sum of $21,139.12, to which interest was added from the date when the buildings were fully completed and occupied by the Home. From so much of the decree as allowed interest the Home appealed to the Circuit Court of Appeals, which rendered a decision of affirmance, 194 Fed. 940; and then the Home appealed here. The sole error assigned challenges the allowance of interest. It is not insisted,

nor could it reasonably be, that this allowance was inequitable or an abuse of discretion in the particular circumstances; so, the only question is, whether in law there was an insuperable obstacle to allowing interest.

The Home is without capital stock, shares or shareholders; is an eleemosynary institution created by the Government to manifest and discharge its sense of gratitude towards those who rendered service in its defense; is under the ultimate supervision of Congress; is supported and maintained from the national treasury, and is essentially a governmental agency. In defining its powers the statute declares that it shall "have perpetual succession, with powers to take, hold, and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity; and to make by-laws, rules, and regulations, not inconsistent with law, for carrying on the business and government of the home, and to affix penalties thereto" (§ 4825); also "to procure . . . sites, . . . and to have the necessary buildings erected" (§ 4830).

It is not questioned that the Home was empowered to make the contracts upon which the recovery was had, or that it was suable thereon; but it is urged that interest is not recoverable against the United States in the absence of some statutory provision or authorized stipulation, and that, as the Home is a governmental agency, a like exemption applies to it.

It is quite true that the United States cannot be subjected to the payment of interest unless there be an authorized engagement to pay it or a statute permitting its recovery. *Angirica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *North Carolina*, 136 U. S. 211, 216. But this exemption has never as yet been applied to subordinate governmental agencies. On the contrary, in suits against collectors to recover moneys illegally exacted as taxes and paid under protest the settled rule is, that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector but directly from the treasury. *Erskine* v. *Van Arsdale*, 15 Wall. 75; *Redfield* v. *Bartels*, 139 U. S. 694.

Without now attempting to lay down a rule for all governmental agencies, we think the exemption of the United States is not applicable to the Home. It is a distinct corporate entity, invested with powers, duties and responsibilities which, in the judgment of Congress, required that it be given power to sue in its own name and be subjected to liability to be sued. Although under the ultimate supervision of Congress, it has a board of managers which exercises a general control over its affairs, and has a corps of other officers of its own, who are

in immediate charge of its activities. It makes contracts and incurs contractual liabilities in its own name, expends and disburses the moneys available for its support and maintenance, and in general occupies a position which takes it without the reasons underlying the Government's exemption from interest. It is significant that the statute permitting suits in the Court of Claims against the Government contains a provision expressly restricting the allowance of interest (Rev. Stat. § 1091), while the statute authorizing suits against the Home contains no such restriction. And it is also significant that the latter authorization is not confined to any particular court, but extends generally to "courts of law and equity." It may be, as has been held elsewhere, that such authorization does not embrace suits for tortious acts of the officers of the Home (see *Overholser* v. *National Home*, 68 Ohio St. 236; *Lyle* v. *National Home*, 170 Fed. 842), but, if so, this does not prove or indicate that in suits to enforce contractual obligations the amount of the recovery is not to be determined by the standards applicable to other litigants.

We think the courts below took the right view of the question, and the decree is accordingly

Affirmed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.